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United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN H. MUSTARD, SAM J. TAGGART AND
FRED AYER,

Appellants,

vs.

E. C. ELWOOD,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Alaska, Second Division.

Filed

JAN 28 1915

F. D. Monckton,
Clerk

United States
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Amended Complaint	3
Assignment of Errors.....	66
Attorneys, Names and Addresses of.....	1
Brief of United States Attorney as Amicus Curiae	12
Certificate of Clerk, U. S. District Court to Transcript of Record	75
Citation on Appeal (Original).....	77
Demurrer	9
Judgment on Demurrer.....	64
Names and Addresses of Attorneys of Record..	1
Opinion on Demurrer	10
Order Allowing Appeal and Fixing Amount of Bond	69
Order Enlarging Time to File Record to De- cember 15, 1914	76
Order Overruling Demurrer.....	10
Petition for an Order Allowing an Appeal.....	68
Praecipe for Certified Copy of Record.....	74
Summons	1
Undertaking	71

[Names and Addresses of Attorneys of Record.]

J. F. HOBBS, Nome, Alaska,
Attorney for Plaintiff.

G. J. LOMEN, Nome, Alaska,
O. D. COCHRAN, Nome, Alaska,
Attorneys for Defendants.

*In the District Court for the District of Alaska,
Second Division.*

E. CHAS. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD, FRED AYER and S. W.
TAGGART,

Defendants.

Summons.

The President of the United States of America, To
John H. Mustard, Fred Ayer and S. W. Taggart,
Defendants Above Named, Greeting:

You are hereby summoned and required to appear
and answer the complaint of the plaintiff on file in
the office of the Clerk of said court, at the city of
Nome, in the said district, within thirty days from
the service of this summons upon you, or judgment
for want thereof will be taken against you; and you
are hereby notified that if you fail to answer the said
complaint, the plaintiff will apply to the Court for
the relief demanded in said complaint.

WITNESS the Honorable John Randolph Tucker,
Judge of the said District Court, and the seal of said

court *court* hereto affixed this the 2d day of March, 1914.

[Court Seal] J. SUNDBACK,
Clerk of the District Court for the District of
Alaska, Second Division.

By _____,
Deputy Clerk. [1*]

United States of America,
District of Alaska,
Second Division,—ss.

I hereby certify that I received the within summons on the second day of March, 1914, and that thereafter on the 14th day of March, 1914, same was returned without service by me at the request of the attorney for the plaintiff and upon his statement that the defendant put in an appearance in this action.

Returned this 17th day of March, 1914.

E. R. JORDAN,
United States Marshal.
By Elmer Reed,
Deputy.

Marshal's Costs: No Service.

[Endorsed]: No. 2514. In the District Court for the District of Alaska, Second Division. E. Chas. Elwood, Plaintiff, vs. John H. Mustard et al., Defendants. Summons. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Mar. 18, 1914. John Sundback, Clerk. By _____, Deputy. [2]

*Page-number appearing at foot of page of original certified Record.

*In the District Court for the District of Alaska,
Second Division.*

E. CHAS. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD, FRED AYER, and S. W.
TAGGART,

Defendants.

Amended Complaint.

Comes now the plaintiff above named, and by leave of Court first had and obtained, files this his amended complaint and alleges:—

I.

That the said plaintiff and defendants are members of that certain voluntary unincorporated club or society organized and existing in the City of Nome, Alaska, known as the “Eni,” which is closed to all except members, all of whom have keys thereto.

II.

That said club or society has been in existence for more than four years last past, and was organized in good faith for social and literary purposes and not for profit, and not with any intent to circumvent or violate any of the laws of the District of Alaska.

III.

That the defendants above named are the principal officers and managers of said club and are known as the [3] “Council of Chiefs.”

IV.

That said club owns and maintains a club house in

said city, adequately furnished as a reading room, dining room, billiard and pool room, also a kitchen and buffet or bar of the value of about fifteen thousand dollars, and known as the "Log Cabin" or "Eni," and said club is known as the "Eni" or "Log Cabin Club."

V.

That the title to said building stands in the name of three trustees, who are members and who hold said title in trust for the use and benefit of the members of said club; and that all other property, including furniture, fixtures and stock has been purchased by the managers of said club in the name of the club and paid for out of the common funds of said club.

VI.

That said club, through said managers, conducts said club house, and said managers have full supervision and control of the same and of said club.

VII.

That the monthly expenses of said club are about one thousand dollars per month; that the receipts of said club, from all sources, do not materially exceed said expenses, and have not to date exceeded said expenses by more than eighty dollars.

VIII.

That said buffet or bar is stocked with whiskey, beer, wines and other intoxicating liquors and cigars, and with a [4] bar and other facilities for serving and drinking the said liquor upon the said premises; that said stock is purchased, from time to time, with the general funds of said club, under the direction of said managers; that said funds are derived from ini-

tiation fees, dues, voluntary subscriptions and the proceeds of the sale of coupon books, sold at five dollars each, each coupon therein representing one-fortieth of the cost of said book, or twelve and one-half cents, and each of said coupons entitling the holder thereof to a delivery to him in said club for his own use of victuals, intoxicating liquor to be drunk upon the premises, or cigars in such quantities as such member may desire not exceeding four gallons of such liquors at any one time, at such value as said managers shall have previously and from time to time determined; and such intoxicating liquors are so delivered to such member in exchange for said coupons and are drunk upon said premises; that such exchange value of said intoxicating liquors, as so fixed by said managers, is the usual retail price of such liquor in said City of Nome, except in the case of mixed drinks such as cocktails and stirabouts, in which case it is less than said usual price.

IX.

That no intoxicating liquors or meals are served otherwise than in exchange for the coupons above mentioned, except board of mess boarders who pay therefor by the month.

X.

That said managers employ on reasonable salary and wages paid, a Secretary, who is a member of said club, a steward and cook and other necessary help.

[5]

XI.

That nonresidents may become guests of said club, but guests are not permitted to exchange or pay for

any liquor or intoxicating drinks.

XII.

That the monies derived, as aforesaid, have at all times been placed in the general treasury of the club, and are used to pay the current expenses of the club, including the replenishing, from time to time, the said stock of victuals, liquors, cigars, etc.

XIII.

That said club has at all times paid the United States Internal Revenue Tax or License required for the retail sale of intoxicating liquors, but has not had nor has it now any other license, and has not, except as hereinafter mentioned, at any time been required by any officer of the Government to pay for or take out any other license, although barroom licenses have been heretofore and are now granted to corporations and partnerships under Sections 2571 to 2577, both inclusive, of the Compiled Laws of the Territory of Alaska.

XIV.

That said club and its officers have recently been notified by the United States District Attorney for the Second Division of the District of Alaska, that they are required to and must take out a barroom license or cease to handle intoxicating liquors in the manner hereinbefore stated or to sell the same, whether to its said members or any other person.

XV.

That said officers, the managers of said club aforesaid [6] under the direction and authority of a majority of the members of said club have signified their refusal to take out said license, and threaten to

continue, and do now continue to furnish and deliver intoxicating liquors in the manner aforesaid without any license therefor, and unless restrained from so doing by the injunction of this court will continue to do so, thereby as the agents of plaintiff and other members of said club subjecting plaintiff and the members of said club to fines and penalties and loss of his or their membership in said club, and their property interest therein, as well as loss of their good name and reputation, to their irreparable injury, loss and damage.

XVI.

That plaintiff has no plain, speedy or adequate remedy at law for the threatened injuries aforesaid.

XVII.

That plaintiff brings this action in his own behalf, and in behalf of a large number of the members of said club similarly situated, for the purposes hereinafter prayed for, and in order to prevent a multiplicity of suits, although plaintiff admits and alleges that an unknown number, and more than a majority of the members of said club, sustain, uphold and support the said defendants, managers as aforesaid, in their refusal to apply for or to take out a retail bar-room license, and in their continued furnishing intoxicating liquors to the members of said club in the manner aforesaid.

XVIII.

That the total number of resident members of [7] said club does not exceed seventy-five, and nonresident members a less number.

WHEREFORE, plaintiff prays that the said offi-

cers of said club, their servants, employees and agents, be enjoined and restrained from continuing the said furnishing or delivery to its members of intoxicating liquors in the form and manner aforesaid, or to sell intoxicating liquors without having first obtained a license so to do; for his costs and disbursements herein; and for such other and further relief as to the Court may seem just and proper.

J. F. HOBBS,

Attorney for Plaintiff. [8]

United States of America,
District of Alaska,—ss.

E. CHAS. ELWOOD, being first duly sworn, on his oath, deposes and says:

That he is the plaintiff named in the foregoing complaint; that he has read the same, knows the contents thereof, and that the same is true as he verily believes.

E. CHAS. ELWOOD.

Subscribed and sworn to before me this 14th day of March, 1914.

[Notarial Seal] LAWRENCE S. KERR,
Notary Public in and for the District of Alaska,
My commission expires May 9, 1917.

[Endorsed]: No. 2514. In the District Court for the District of Alaska, Second Division. E. Chas. Elwood, Plaintiff, vs. John H. Mustard et al., Defendants. Amended Complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Mar. 14, 1914. John Sundback, Clerk. By ———, Deputy. J. F. Hobbes, Attorney for Plaintiff. [9]

*In the District Court for the District of Alaska,
Second Division.*

E. C. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD, SAM J. TAGGART, and
FRED AYER,

Defendants.

Demurrer.

Come now the defendants above named and demur to the amended complaint herein on the ground and for the reason that it appears on the face of said amended complaint that the same does not state facts sufficient to constitute a cause of action.

G. J. LOMEN and

O. D. COCHRAN,

Attorneys for Defendants.

[Endorsed]: No. 2514. In the District Court for the District of Alaska, Second Division. E. C. Elwood, Plaintiff, vs. John H. Mustard et al., Defendant. Demurrer. Filed in the Office of the Clerk of the District Court at Nome, Alaska, March 23, 1914. J. Sundback, Clerk. By J.A.B., Deputy. G. J. Lomen & O. D. Cochran, Attorneys for Defendants.

[Order Overruling Demurrer.]

*In the District Court for the District of Alaska,
Second Division.*

TERM MINUTES: General 1914 Term beginning
January 5, 1914.

Saturday, May 23, 1914, at 10 A. M.

Court convened pursuant to adjournment.

Hon. J. R. Tucker, District Judge, presiding.

Upon the convening of court the following proceedings were had:

* * * * *

2514. E. Chas. Elwood vs. John H. Mustard et al.

The Court having under consideration the demurrer of defendants to plaintiff's amended complaint, ordered said demurrer overruled.

Order overruling demurrer signed and filed.

Brief of U. S. Attorney F. M. Saxton and Assistant U. S. Attorney N. A. Peery, *amici curiae*, filed.

Brief as aforesaid refiled as the opinion of the Court herein. [11]

[Opinion on Demurrer.]

*In the District Court for the District of Alaska,
Second Division.*

E. CHAS. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD,

Defendants.

I am of the opinion that the Demurrer to the Amended Complaint should be overruled and the prayer of the complaint granted.

In lieu of a written *of a written* opinion in the case the Court adopts the Brief of Counsel for the Government appearing as *amici curiae* as its opinion and directs that it be so filed.

May 23/1914.

J. R. TUCKER,
Judge.

Upon the general proposition as to whether or not the method of distributing liquors to the club members is a sale &c. I think the brief of argument by Atys. for the Government accepts and announces the better opinion of the conflicting decisions of the Courts; upon the statutory phase of the question to my the brief of counsel for the Government is conclusive. [12]

[Endorsed]: # 2514. Memo. Opinion and Order. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 23, 1914. John Sundback, Clerk. By J. A. B. Deputy. C. Vol. 10, Orders & Judgments, p. 488. [13]

ORIGINAL.

*In the District Court for the District of Alaska,
Second Division.*

E. CHAS. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD, FRED AYER, and S. W.
TAGGART,

Defendants,

.Brief of United States Attorney as Amicus Curiae.

This action is brought by the plaintiff on behalf of himself and a minority of the members of the "Eni" or "Log Cabin Club," for the purpose of testing the right of said club to furnish intoxicating liquors to its members, without first having applied for and secured a barroom license to sell intoxicating liquors at retail. The facts are stated in the amended complaint and are admitted by the demurrer thereto.

Conceding the Courts jurisdiction of the subject matter of this action, there are but two questions to be decided:

FIRST: Do the transactions complained of constitute SALES of intoxicating liquors; and

SECOND: If such transactions do constitute SALES, [14] then, do such SALES by said "Eni" club without first having secured a barroom license constitute a violation of Section 2581 of the Compiled Laws of the Territory of Alaska?

We will consider these questions in their order, but will state the first a little more broadly thus:

AN UNINCORPORATED SOCIAL CLUB ORGANIZED FOR THE ENTERTAINMENT AND PLEASURE OF ITS MEMBERS PURCHASES INTOXICATING LIQUORS WITH THE COMMON FUNDS OF THE CLUB AND DISPENSES THE SAME TO ITS MEMBERS AND GUESTS TO BE DRUNK UPON THE PREMISES, CHARGING THEREFORE A PRICE PER DRINK, OR BOTTLE, FIXED BY THE GOVERNING POWERS OF THE CLUB. IS SUCH A TRANSACTION A SALE WITHIN THE MEANING OF THE LICENSE LAWS OF THE TERRITORY?

The Compiled Laws of 1913, provide:

Section 2571: "That no person, corporation or company shall sell, offer for sale, or keep for sale, traffic in, barter, or exchange for goods in said District of Alaska, any intoxicating liquors, except as hereinafter provided * * * . Wherever the term 'intoxicating liquors' is used in this Act, it shall be deemed to include whiskey, brandy, rum, gin, wine, ale, porter, beer, hoochinoo, and all spirituous, vinous, malt, and other fermented or distilled liquors."

Section 2577: "That the liquor licenses authorized and provided by this Act shall be of two classes, namely, wholesale and barroom. * * * That a retail or barroom license shall be required for every hotel, tavern, boat, barroom, or other place in which intoxicating liquors are sold at retail * * * That every place where distilled, malt, or fermented wines, liquors, or cordials are sold in quantities as prescribed for retail dealers by section thirty-two

hundred and forty-four of the Revised Statutes of the United States, *to be drunk upon the premises, shall be regarded as a barroom*, and the possession of malt, distilled, fermented, or any other intoxicating liquors with the means and appliances for carrying on the business of dispensing the same to br drunk where sold, shall be *prima facie* evidence of a barroom within the meaning of the Act, and the license therefore shall be known as a barroom license
* * * .”

The Act above set out is so plain and unambiguous that it would appear to come within the class of laws which the courts say “need no interpretation.” [15]

There is, however, an irreconcilable conflict of authority in the construction of similar statutes, or rather in the construction of the license laws of the various states as applied to such associations or clubs. Many of the decisions upholding the right of such clubs to dispense liquors to their members without the payment of the license required for retail dealers are based upon the particular wordings of the statutes construed, and one, the Pennsylvania case hereinafter cited, gave serious consideration to the fact that the club had been in existence for many years, a fact well known to the legislature, and that the legislature had not seen fit to bring it strictly within the terms of the statute. In order words, that the state was estopped, for the reasons stated, from demanding the payment of a retail license by the club. This reasoning does not appeal to other courts which have reviewed this decision, as I shall hereinafter show. But in all of the decisions favor-

able to the clubs, I think it safe to say that not one is based upon a statute as plain in terms as that of the law we are now discussing. Even under the statutes in most of the cases mentioned the decisions appear to me to be “strained.”

It is also worthy of note that in nearly all of the states in which decisions have been rendered in favor of the right of clubs and associations to sell liquors or “dispense” them to members without the payment of a license, the statutes have been subsequently amended bringing such clubs specifically within the terms of the statute and made so plain that no court can misconstrue them.

It would serve no useful purpose to review these decisions in detail. In the few cases which do not turn wholly upon the construction of the statutes the argument [16] is made that the dispensing of liquors to the members of such associations do not constitute a “sale” within the meaning of the license laws. That the liquor is the common property of the members, bought with the common funds of the club, and that the dispensing of the same to the members is only a means of distributing the common property among the owners. In other words, that the individual member in taking the liquor is only segregating his own property from the common mass, although he pays into the common fund the full value of all he so extracts.

Among the more recent, and which may be called the leading, cases that take this view are—

Tennessee Club v. Dwyer, 11 La. 452 (47 Am. R. 298);

State v. Austin Club, 89 Tex. 20 (30 L. R. A. 500);

Piedmont Club v. Com., 87 Va. 540;

State ex rel Bell, v. St. Louis Club, 125 Mo. 308 (26 L. R. A. 573);

Com. v. Pomphret, 137 Mass. 564;

People v. Adelpia Club, 149 N. Y. 5 (31 L. R. A. 510);

Klein v. Livingston Club, 117 Pa. 224 (34 L. R. A. 94);

Cuzner v. California Club, 155 Cal. 303 (20 L. R. A. (N. S.) 1095).

On the other hand there are many courts that are not impressed with the specious reasoning of the cases cited, and hold as does the Supreme Court of Maryland in *State v. Easton Social Club*, 73 Md. 97 (10 L. R. A. 64),—"that there is no occasion to be astute and to indulge in questionable refinements in order to relieve these corporations of the just consequences of their acts, or to endeavor by artificial or fictitious reasonings to permit persons in combination to do what individuals without combination could not do."

Among the State cases so holding are:—

People v. Soule, 74 Mich. 250 (2 L. R. A. 494);

State v. Easton Social Club, 73 Md. 97 (10 L. R. A. 64);

State v. Mudie, 22 S. D. 41 (115 N. W. 107);

Martin v. State, 59 Ala. 34;

Beauvoir Club v. State, 148 Ala. 643 (42 So. 1040);

Marmont v. State, 48 Ind. 21;

State v. Mercer, 32 Iowa, 405;

State v. Lochyear, 95 N. C. 633 (59 Am. Rep. 287);

State v. Horacek, 41 Kansas, 87 (21 Pac. 204);

State v. Boston Club, 45 La. Ann. 585 (20 L. R. A. 185);

Mohrman v. State, 105 Ga. 709 (43 L. R. A. 398);

State v. Minnesota Club, 106 Minn. 515 (20 L. R. A. (N. S.) 1101);

Spokane v. Bangham, 54 Wash. 315 (103 P. 14);

State v. Kline, 50 Ore. 426; [17]

South Shore Country Club v. People, 228 Ill. 75 (12 L. R. A. (N. S.) 519;

People v. Law & Order Club, 203 Ill. 127 (62 L. R. A. 884);

Manning v. Canyon City, 45 Colo. 571 (101 Pac. 978);

Ada County v. Boise Commercial Club, 118 Pac. 1086;

State v. Neis, (N. C.) 12 L. R. A. 412.

The courts seem to be unanimous in holding that when clubs are organized for the purpose of evading the license laws or against the provisions of the local option laws, and dispense liquors, purchased with the common funds, to the members at a fixed price per drink or bottle, such a transaction constitutes a "sale" within the meaning of those laws. See cases cited in note to South Shore Country Club v. People, 12 L. R. A. (N. S.) 519.

We confess that we are unable to follow the reasonings of those courts that hold that the same transaction constitutes a "sale" or does not constitute a "sale," depending upon the purposes for which the club exists, or whether a license law is being construed, or a local option law which prohibits any *sale* within a prescribed territory; the question being in each case what acts constitute a "sale," not what the purpose and design of the "sale" may be.

The above cited case, *South Shore Country Club v. People*, 12 L. R. A. (N. S.) 519, was very carefully considered by the Supreme Court of Illinois. The defendant club was a corporation, not for pecuniary profit, but for the pleasure and social recreation of its members—one of the usual high class clubs found in the cities. The sale of liquors to its members was purely incidental to the objects and purposes of the club, the same as the furnishing of meals etc., but the members were charged for liquors the same as for meals "and for the services of caddies, boatmen and teachers and for horses, golf supplies, and special services" The club held a United States retail liquor dealers license, but the plea averred that it was secured [18] "inadvisedly and was not necessary."

The Court speaking through Mr. Justice Cortwright, says:

"The right to engage in the business of selling intoxicating liquors by retail is not now a common right, and can be exercised only in the manner and upon the terms which the statute prescribes. *People ex rel. Morrison v. Cregier*, 138 Ill. 401, 28

N. E. 812. The statute provides for licensing such sales, and makes a sale without a license a criminal offense. It provides that whoever, not having a license to keep a dramshop, shall sell any intoxicating liquor in any less quantity than one gallon, or in any quantity, to be drunk upon the premises, shall be punished by fine, or imprisonment, or both; and, if appellant has been guilty of a misuse of its corporate power by making sales of liquor to be drunk upon its premises, the judgment of the superior court must be affirmed. The only question to be determined is whether the furnishing and delivery of intoxicating liquors by appellant to its own members, to be drunk upon the premises, and which are paid for by the individual members to whom the same are furnished and delivered, constitute a sale. Counsel for appellant admits that the letter of the statute requires any and every one, without exception, who sells intoxicating liquors in any less quantity than one gallon, or in any quantity, to be drunk upon the premises, to take out a license to do so; and he fully appreciates that the definition of a dramshop adopted by the legislature is broad enough to include any place where intoxicating liquors are retailed in less quantity than one gallon; but he says that appellant contests the right to demand a license because it refuses to have its clubhouse considered a dramshop, or to be regarded as a dramshop keeper. The argument is that the court should not take the language of the statute literally, and that the general intent and spirit of the act do not require that it should

be so taken. A dramshop, as defined by the statute, is a place where spirituous, or vinous, or malt liquors are retailed by less quantity than one gallon; and it is true that the term has, in popular acceptance, a more restricted meaning. It is commonly used to designate a place where intoxicating liquor is sold at a public bar frequented by the public without restriction, and, if the legislature had failed to define what was intended by the term "dramshop" it would be reasonable to presume that it was used in the ordinary and popular sense; but, of course, the legislature had a right to define what was meant by the term as used in the act, and the courts are bound by the definition. The argument of the appellant is the same as that of the druggist, Wright, who felt himself aggrieved that his drug store should be brought within the definition of a dramshop by the sale in good faith of liquor for purely medical purposes. His chief business was the sale of drugs and medicines, and he did not even sell intoxicating liquors as a beverage, as the appellant does. The court put in the background the popular idea of the [19] dramshop, saying that undue importance was given to that term, and enforced the law according to its literal meaning. The court said: The only safe course is to enforce the law as the legislature has made it, and not defeat its execution upon some hypothetical theory of public policy that finds no place or recognition in the act itself." *Wright v. People*, 101, Ill. 126. Appellant's clubhouse would be no more or less a dramshop with the license than without it, and, if the facts bring it within the defini-

tion adopted by the legislature, it must be held to be a dramshop, whether the definition accords with the popular understanding or not."

The Court then takes up two of the cases above cited, holding to the contrary, to wit,—*Klein v. Livingston Club*, 177 Pa. 224, and *State v. St. Louis Club*, 125 Mo. 308, and after stating what was considered and decided in those cases, says:

"It is undoubtedly equitable, as said in the Pennsylvania case, that the members of a club who drink the liquor should pay for it, and that those who do not touch it should not pay anything; but we do not see how it can be said that the transaction is merely an equitable distribution between the members of property belonging to them in equal shares. The liquor belongs to the corporation as a legal entity, and no member owns any share of the liquor, as a tenant in common with the other members or otherwise. An association organized merely for social, literary, scientific, or political purposes, although not incorporated, is not a partnership. 25 Am. & Eng. Enc. Law 2d. ed. p. 1137. A member of such association has no individual right or interest in the property, and owns no proportionate share of it, but only has a right to the joint use so long as he continues to be a member. Even if they were tenants in common, a transfer of a specific part of the property to one for a stipulated price would be a sale. Appellant however, is incorporated, and its stockholders are not tenants in common of its property; but the title is in the corporation. The right of a stockholder is to participate, according to the

amount of his stock, in the profits, and, upon the dissolution of the corporation, to share in the assets remaining after the payment of the debts. If a member should clandestinely enter the clubhouse and withdraw from what is called the "common property," as much of the liquor as would be represented by his interest as a member, it would hardly be contended that the act would not be larceny. The arguments presented to show that the dispensing of liquors for fixed prices paid by the members is not a sale, if applied to the case supposed or any other conceivable transaction, would certainly be unique. We agree with the views expressed in *State v. Easton Social, Literary & Musical Club*, 73 Md. 97, 10 L. R. A. 64, 20 Atl. 783, that there is no occasion to be astute, and to indulge in questionable refinements, in order to relieve these corporations of the [20] just consequences of their acts, or to endeavor by artificial or fictitious reasonings to permit these persons in combination to do what individuals without combination could not do.

The fact that there is not profit in a sale does not deprive the transaction of its character as a sale, and surely it makes no difference that the sale of the liquor is only incidental to the main purpose of the club. *Mohrman v. State*, 105 Ga. 709, 43 L. R. A. 398, 70 Am. St. Rep. 74, 32 S. E. 143. The sale of liquor is but an incident to the business of a drug store or restaurant. It is certainly but a trifling incident to the business of a large hotel. The business is carried on in department stores, where it is but a minor and incidental branch of the whole business.

Chicago v. Netcher, 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707. It is immaterial whether the main purpose of a corporation is social pleasure or making money by the sale of merchandise, if intoxicating liquor is sold at retail as an incident of the main purpose or otherwise; and neither is the fact that the public generally are not admitted.

We are convinced that the former decision of the question here involved was correct, and the judgment of the Superior Court is affirmed.”

In *Martin v. State*, 59 Ala. 34, and *State v. Neis*, 108 N. C. 787 (12 L. R. A. 412), it was held that the *employee* of a social club, who, without a license, dispenses intoxicating liquors, was guilty of selling without a license, although the liquor had been purchased with the funds of the club, and was sold only to the members of the club, and the money received therefor was deposited in a common fund, and was spent only to replenish the stock of liquors for the use of the club.

And the club itself, upon such a state of facts, was held liable to the penalty for selling liquors by retail without a license, in *State v. Essex Club*, 53 N. J. L. 99 (20 Atl. 769).

In *Mohrman v. State*, 105 Ga. 709, it was held that the mere fact that the selling and drinking of intoxicating liquors was only an incident, and not the main object, of the incorporation of a social club, would make the place [21] where such liquors were dispensed to and drunk by members only, none the less

a tippling-house, within the meaning of the statute making penal the keeping open of such a house on the Sabbath day.

In *People v. Soule*, 74 Mich. 250, it was held that a club properly organized in good faith could not purchase liquors by the quantity and distribute them among its members receiving pay therefor as they were distributed by the glass, the proceeds to go into the treasury of the club to be used in purchasing other liquors, or in paying expenses, without being liable to pay a retail tax for selling such liquors; it being clear that the statute regulating the sale of intoxicating liquors *was not aimed at saloons or public bars alone*, because it expressly provided that retail dealers "shall be held and deemed to include all persons who sell any of such liquors by the drink," and further provided that "all saloons, restaurants, bars in taverns or elsewhere, and all other places, except drug stores, where any of the liquors mentioned in this Act are sold or kept for sale either at wholesale, or retail, shall be closed on the first day of the week."

Another well considered recent case is that of *Manning v. Canyon City*, 101 Pac. 978 (Supreme Court of Colorado). The defendants constituted the board of control of the Elks Club of Canyon City. They were found guilty in the lower court of a violation of an ordinance reading as follows:

"Whosoever by himself or another either as principal, clerk agent, or servant, shall sell or dispose of, or shall give away for the purpose of avoiding any of the provisions of this ordinance, any intoxicating,

spirituous, malt, vinous fermented or mixed liquors within the corporate limits of this city, or within one mile beyond the outer boundaries thereof, shall be fined not less than one hundred (\$100) dollars, nor more than three hundred (\$300) dollars for each offense; provided that this ordinance shall not apply to regularly licensed druggists, who may have a permit from the city council to sell such liquors, when sold in accordance with said permit.” [22].

In the opinion, Mr. Chief Justice Steele, speaking for the Court, says:

“The club is a part of and under the control of the Canyon City Lodge of the Benevolent Protective Order of Elks of the United States of America. The membership of the order is in excess of a quarter of a million of persons, and it, through the subordinate lodges maintains clubs in many of the towns and cities of the country, and there are clubs of the order maintained in most of the important cities and towns of this State. This club is a *bona fide* club, and, as found by the court below, is composed of about 400 substantial and respectable citizens of Cannon City. It is maintained for the entertainment, pleasure and benefit of the members of the order, and any member of the order whether resident of Cannon City or elsewhere, is entitled to the privileges of the club. The club is supplied with newspapers, magazines, and such reading matter as the management may deem advantageous or desirable for the members. It maintains billiard, pool, and card tables. Food and liquors are dispensed to such of the members as may desire them. In short, it is a social club, like any

other social club to be found in the larger towns and cities of the country; the dispensing of liquors being a mere incident to, and not the object of, the organization. It is an unincorporated association. No visitor or guest of a member is permitted to spend money in the club, but the member introducing the visitor or guest is responsible for his guest's entertainment. The club keeps on hand a supply of the various kinds of intoxicating liquors, which it dispenses to its members and guests, and the members of the order, at the rates fixed by the board of control. Those to whom liquors are supplied may pay cash or have the amount charged. The amount received from the members for the liquor goes to replenishing the supply of liquors and defraying the expenses of the club."

* * * * *

"It is contended by counsel for the defendants that the process by which the members of the club obtain the title to a quantity of liquor, to be disposed of by the individual as he may desire, is not a 'sale,' but a mere distribution of the liquor of the club among its members. On the other hand it is contended by the city that such process is a sale and is within the prohibition of the ordinance, and upon a determination of these propositions the whole controversy depends. If such disposing of liquors constitutes a sale, then the defendants were legally convicted, and the judgment should stand; otherwise the judgment should be reversed and the defendant discharged.

"The decisions are in irreconcilable conflict. In the decisions where courts hold that clubs are exempted

from the license laws, it is generally because of some peculiar word or phrase contained in the statute, and it should be noted that no case is presented where a prohibition statute has been construed as exempting social clubs from its operations. In the case of *State v. Kline*, 50 Or. 426, 93 Pac. 237, decided in 1907, and the latest case we have seen on the subject, Mr. Justice Moore, in the course of the opinion said: 'In the note to the case of *Barden v. Montana Club*, 24 Am. St. Rep. 27, immediately following the excerpt hereinbefore [23] quoted, the editors of that valuable series of case laws makes the following observation as deducible from an examination of adjudications applicable to the inquiry, to wit: The question whether or not the furnishing of intoxicating or fermented liquor by a club to its members in the manner above stated constitutes a sale in violation of laws prohibiting sales, or whether or not it constitutes a sale within the meaning of a law requiring a license before one can engage in retailing such liquor, has been the subject of various and conflicting decisions by a number of the appellate courts of the country. While the cases cannot be reconciled, the current as well as the weight of authority in undoubtedly in favor of the rule that the distribution and consumption of liquors in a club by its members in the manner above stated is a sale and a violation of the laws of the nature stated.' Several cases are cited, and quotations therefrom are contained in the note that fully sustain the conclusion thus reached, and we adopt that part of such deduction as relates to the disposal of intoxicating liquor by a club to its

members in violation of the provisions of a local option law, without further calling attention to the cases relied on.”

The Court then discussed a number of opinions hereinbefore cited, and continues:

“Supporting the doctrine announced in the foregoing decisions are the decisions of the Supreme Courts of Alabama, Kansas, Kentucky, North Carolina, Mississippi, Indiana, Michigan, Georgia, West Virginia, and Louisiana; and whenever the question has been presented to a federal court, that court has held the clubs liable as retailers to pay the government tax. Not only is the greater weight of authority, but, in our opinion, the better reason, on the side of those courts that hold the transaction between the club and its members, such as we have described herein, to be an ordinary sale.” (Citing cases.)

“There are many authorities supporting the view that the transaction by which a member of a club acquires a quantity of liquor for his own use upon the payment of a stipulated price is not a sale. It is so held in Missouri, by the Supreme Court, in *State v. St. Louis Club*, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573; but Judge Phillips, then District Judge for the Western District of Missouri, held, in the case of *United States v. Giller* (C. C.), 54 Fed. 656, that social clubs where liquor was dispensed were retail dealers and were required to pay the Government tax, and in a case decided by the St. Louis Court of Appeals (*State v. Bacon Club*, 44 Mo. App. 86), it was held that such a transaction is a sale within the prohibition of the statute of the State. The opinion

closes with this significant sentence: 'The principle of law that prohibits a laboring man from buying a drink of liquor in a saloon ought to prevent wealthy gentlemen from organizing themselves into corporations for the purpose of selling it to their members.' "

In Massachusetts the Supreme Court holds that [24] the distribution of liquor to the members of a club, by a transaction similar to the one before us, is not a sale. *Com'rs v. Smith*, 102 Mass. 144. But the federal court of Massachusetts held that such transactions were sales, and the clubs were liable for the violation of the federal laws as retail dealers. *United States v. Wittig*, 28 Fed. Cas. 744.

The Pennsylvania Supreme Court holds, in *Klein v. Livingston Club*, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717, that, where an incorporated social club is organized and conducted in good faith, owning its property in common, to which the furnishing of liquor to its members is merely incidental to the purpose for which it was organized, the furnishing of liquors does not constitute a sale; but the federal courts of Pennsylvania hold that such dealing with members of clubs does constitute a sale, and requires the clubs to pay the Government tax as retail liquor dealers. *United States v. Alexis Club* (D. C.), 98 Fed. 725. The facts in the federal case were about as they are here, and Judge McPherson, in his opinion, says, among other things: "Did the defendant, then, sell liquor to its members? I shall not review the irreconcilable cases upon this subject, nor make the superfluous attempt to pro-

duce a new argument, in support of my conclusion. I content myself with saying briefly, that I agree with the general opinion of the community, and hold the transaction to be a simple, ordinary sale. If a chartered club, such as the defendant, buys liquor, the legal title to this property is in the corporation, and not in the members. * * * The legal title, then, being in the corporation, it is further to be observed that, when the title passes to a consumer, it passes by a transaction that exhibits every element of a sale, and shows no outward sign of being anything else. The intending consumer asks to be served with a definite quantity of intoxicating drink. The owner of the legal title of the liquor, acting by a paid servant, agrees to the request, requires the price to be paid in cash, or accepts the consumer's promise to pay in the future, and thereupon delivers the subject of the bargain. Nothing else takes place, and, if this is not a sale, but is really a partial distribution of the common stock, the truth is so veiled that the participants in the transaction, I venture to assert, rarely suspect that they are taking part in anything but a commonplace sale. It is safe to say that—except, perhaps, among those lawyers that may be familiar with the discussion upon the subject—to order and receive liquor at a club is always regarded as a sale, and I see no sufficient reason for declining to accept the popular estimate of an act so generally known and so easily comprehended. * * * I may, perhaps, be permitted to add a single word in conclusion: 'If the result that I have reached is correct, I believe it to be in the line of enforcing equality

before the law; and equality before the law is a principle of American society than which there is none more vital. Privilege and privileged classes are, and ought to be, intolerable; and it comes irritatingly near to a privilege when social clubs, offering advantages of comfort and luxury that are only within the reach of the more prosperous, escape a share [25] of the public burdens, because a refined reasoning declares that they are doing no more than distributing a common stock of liquor among their members, while the robust sense of the community, not excluding the club members themselves knew the transaction to be a sale.' "

There are other authorities which sustain counsel in their contention that the transaction of the club in dispensing liquor is not a sale, but we are unable to distinguish the act of the club in disposing of its liquors to its members and any other process by which the title to intoxicating liquors is passed from one person to another by delivery and payment. In many of the cases cited the liquor disposed of in clubs was the property of a corporation, and the courts hold that, as the legal title to the liquor was in the corporation, and not in the individual members, the transfer by the corporation to the members constituted a sale, and counsel attempts to distinguish between the case at bar and those cases.

When one becomes a member of the Elks' Club, he places his interest in the club property in the hands of a board of control, and he has a joint interest in the club property so long as he remains a member, subject to the right of the board of control to dispose

of it as provided by the by-laws. The testimony shows that the Elks' Club, through its board of control, or a servant thereof, delivers to the members on demand such quantity of liquor as he may desire, for such price as has been fixed by the board, to be paid for in cash or to be charged to the member's account. The liquor thus delivered may be consumed by the member, or may be given away, or may be destroyed. The money that is received is used to replenish the treasury of the club, and in buying other liquors or supplies. The member, assuming that he has an interest in it, has but a minute interest; and, when he exchanges his money for a quantity of liquor, he pays for his minute interest and the interest of each of the other members. But it is doubtful if he has any interest which he may take by this method of distribution. "By becoming a member of a society or club a person acquires, not a severable right to any of its property, but merely a right to its joint use and enjoyment so long as he continues to be a member, which right ceases upon his withdrawal or expulsion from the society. The right of membership invests him with no individual transmissible interest in the property and effects of the association, and neither he nor any number less than the whole can dispose of such property, or any supposed proportionate part or interest therein." Am. & Eng. Ency. of Law, (2d ed.), Vol. 25, p. 1135,

But when the members of a club *chose* the board of control with the authority to dispose of liquor belonging to the club, they relinquish their right to have the entire property of the club remain intact for

joint use, occupancy and enjoyment of all the members, and make such board their agent to dispose of the liquor, and, in our opinion, such disposal by the board is a sale pure and simple. The transaction appears to contain all the elements of a sale. Such transaction is but a contract between the parties to give and to pass rights of property for money which the buyer pays, or promises to pay, to the [26] seller for the thing bought and sold; and it would require, to paraphrase the remarks of Judge McPherson, a refined reasoning to declare that the club is doing no more than distributing a common stock of liquor among its members, while the robust sense of the *cumminity*, not excluding the members themselves, know the transaction to be a sale.

Under the by-laws of the club, any of the several hundred thousand members of the order of Elks in the United States, is entitled to all the privileges of the club, and it is not seriously contended that under a by-law such as this the delivery of liquor for pay does not constitute a sale; but we have determined not to base our judgment upon such fact alone. Owing to the great number of social clubs in the State whose status concerning the disposition of intoxicating liquors should be determined, we have concluded to rest our opinion on the broader ground and settle the controversy."

The latest case which I have been able to find on this subject is *Ada County v. Boise Commercial Club*, decided by the Supreme Court of Idaho, November 1, 1911, and reported in 118 Pac., at page 1086 et seq. This was an action by the County of Ada against the

Boise Commercial Club to collect a license for the sale of liquors. The case was submitted on an agreed statement of facts. The defendant was a corporation organized under the laws relating to religious, social and benevolent corporations, had no capital stock and was not conducted for pecuniary profit. The main purpose of the club, was the same as that of other commercial clubs—to advance the commercial interests of the city and State.

In the opinion the Court says:

“This appeal involves the construction and application of section 1506, Rev. Codes. This section reads as follows: “It shall be unlawful for any person, by himself, by agent, or otherwise, to sell spirituous, malt or fermented liquors or wines, to be drank in, or about the premises where sold without having first procured a license and given a bond.
* * * ” This section became the law of this State on the 1st day of July, 1891. Counsel for appellant makes two different contentions against the application of this statute to the facts of this case: First, that it was not the intention of the Legislature to make the word “person” as used in section 1506, include clubs of the kind and character described in the agreed statement of facts. We think the statutes of this State answer this objection. [27]

(1) Section 15 of the Revised Codes provides: “Words and phrases are construed according to the content and the approved usage of the language, but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be

construed according such peculiar and appropriate meaning or definition.”

(2) Section 16, Rev. Codes, among other things, provides: “The word person includes a corporation as well as a natural person.” This latter section of the statute became a law while Idaho was still a territory, and has been continued as a part of the laws of Idaho since its statehood, and the definition of the word “person” has never been changed or altered or questioned by the Legislature in any subsequent legislation, and the definition given in the statute has been accepted as the true and correct definition, and such has been the usage of the term “person” since the adoption of such statute; and in construing the same we are admonished by section 15, *supra*, that words and phrases are construed according to the context and the approved usage of the language, and we think that the accepted usage of the term “person” has been and is that it includes a corporation as well as a natural person.

(3) It is, however, urged by counsel for appellant that, inasmuch as the Legislature fails to include the term “incorporated club” in the provisions of section 1506, therefore the Legislature did not intend to include such club within the provisions of said section. It was unnecessary to classify the character or kinds of corporations which would be required to secure a license to sell intoxicating liquors to be drank on the premises, unless the Legislature had in mind the exclusion of a particular kind or character of corporation from the operation of the statute, because it had previously been enacted

and had long been a law when section 1506, was enacted and the word "person" included all corporations, and we think the conclusion is inevitable that, if the Legislature intended to exclude any particular kind of corporation, they would have so declared in the section. Therefore, when the Legislature said "any person" they intended that the word should mean the same as defined by the Code, and should include corporations, and, if so, if clubs are corporations, the word "person" includes such corporations.

The Court further says:—

"The second question urged upon this appeal is: Are the transactions with reference to the distribution of intoxicating liquors as set out in the agreed statement of facts sales? It must be conceded at the inception of a discussion of this question that the courts are very much divided. This conflict of views has arisen out of two different causes, the first the language used in the statutes of the various states requiring a license; the second, an apparent notion that there are good clubs and bad clubs, and that the clubs which are good and are not exclusively engaged in the business of selling intoxicating liquors are, or ought to be, exempt from the statute requiring a license, while all other clubs must procure a license. Under the facts in this case the Boise Commercial Club is a corporation organized as a club and it is agreed: [28] "That ever since the organization of this club it has maintained in connection with its buffet a stock of vinous, spirituous and malt liquors and cigars in quantities sufficient to fulfill the wants

of its members and their guests. That these liquors and cigars are purchased by the club at wholesale prices and supplied to members and their guests exclusively, without pecuniary profit to the club, in small quantities or individual drinks, to be consumed by such member and guest within the clubrooms. That the amount paid by such member for such drink is in excess of its original cost to the club, but the amount of this charge is regulated to cover the actual cost to the club of the liquor and cigars and expense of serving the same and conducting the buffet. On being served the member signs a card which is thereafter filed by the servant of the club in the office of the secretary, and is paid by the member before leaving the clubroom or charged to his account." While it is true the furnishing of such liquors is merely incidental to the main objects and purposes of the club, still that fact is no way lessens the transaction. The club purchases and keeps in stock the liquors, and furnishes the same to the members and their guests, and a charge is made therefore in excess of the cost of such liquor to the club. It thus appears from this statement that the liquors are the property of the club. (Citing cases.)

The club being a corporation, under our statute the stockholders and members thereof bear the same relation to the club as stockholders in any regular corporation organized under the statute, and the property purchased by the club and dispensed to its members is a disposition on the part of the club, to the members, of such property, and the members secure the possession of the liquor by paying the club

a certain price. An examination of this statute discloses the fact that the "person" making the sale is not limited to a person engaged in the business of selling liquor, or a person engaged in conducting a saloon or a disorderly place of business, or that the selling of liquor shall be the principal business conducted, and not a mere incident to aid the principle business, but does require that all persons who sell, whether the sale be an incident of, or the principal business, or be made at a profit or a loss, shall procure a license before the sale is made.

Had the Legislature intended to make any exception of the extent of the sale or the place where or the manner of the sale, or the place where the liquor is sold, or whether the sale was at a profit, or whether it was made simply to aid a general business carried on, it no doubt would have made some provision in the statute for such exception. The fact that the sales made by the club are merely incidents of the general purposes and objects of the club, and are not made for profit, does not relieve the club from the obligations of the statute, because if they were true, then there is no reason why a grocery store, or a dry goods store, or a blacksmith shop might not keep a stock of liquor on hand and sell the same as a mere incident to the business carried on by such person, and as a means of inducement to persons to patronize the particular place. So might the entire populace organize itself [29] into various corporations or organizations or clubs for the purpose of carrying on or promoting some particular business or enterprise, and, as an incident to the main business, keep

a stock of intoxicating liquors on hand and furnish the same to the members or patrons, even at a loss, and thereby increase their patronage so that the increase in trade would be the profit, and thus the statute be entirely evaded. It is no doubt true that when the Commercial Club was organized it attached as a part of the business of the club the sale and disposition of intoxicating liquors as an inducement to persons to become members of the club in order that they might have the accommodations furnished at the bar of the club, and the club may have benefited and profited by the fact that its membership was increased by reason of this special inducement, although the direct profits of the sale of the liquor was a matter of little consequence and of little profit. Section 1506 of the statute however, makes no such exception, and there is no other provision of the statute which seems to make any such exception.

But it is contended that there was no sale made by the club of intoxicating liquors. The stipulation of fact says that the club purchased intoxicating liquor and supplied it to members and their guests, and that the amount paid by the members for such drink was in excess of the original cost to the club. Was this a sale within the meaning of the statute? There is no definition given by the statute of the word "sale" as used generally throughout the Code, but we are admonished by the provisions of section 15 of the Code that "words" and phrases are construed according to the context and the approved usage of the language," and the word "sale" as used in said section is a word that has been well defined in its mean-

ing by the courts and text writers, and is also a word of approved usage. As generally used "sale" means the transfer of title by valid agreement from one party to another for some consideration. 1 Mecham on Sales Sec. 1; 1 Benjamin on Sales p. 1; Black's Law Dictionary p. 1053.

In the case of *State v. Kline*, 50 Ore. 426, 93 Pac? 241, in defining the word "sale" used in a statute which prohibited any person within the prescribed bounds of a prohibition district to sell any intoxicating liquors whatsoever, and that such person should be subject to prosecution, the court says: "It would seem from an inspection of the language last quoted, that the section was framed with an intent to prevent the disposal of intoxicating liquors by a nonincorporated social club to its members within prohibited territory, even if it were determined that the transfer of the special property in the liquor by an agent of the organization to a member thereof constituted only a gift. Where, however, as is assumed in the case at bar intoxicating liquors are purchased by an incorporated society, to be used as is hereinbefore detailed, it would appear that the corporation is the owner of the liquors, and, when they are dispensed to a member with the intent to pass the title in the goods, the act constitutes a "sale." In that case the court had under consideration the liability of an agent of a corporation organized for the same general purpose as the applicant in this case." [30]

The Court then discussed the Colorado case above cited and the opinion of Judge McPherson, in *United States v. Alexis Club*, 98 Fed. 725, and says:—

“We think this statement of the Federal Court is correct and clear, and that little can be added to what is there said. We think, however, we might supplement the language of that court by saying that we do not believe that the opinion is generally entertained by members of any social club, incorporated under the laws of a state, which sells intoxicating liquors, and a charge is made therefor, that the transaction is anything else than a sale. The member makes the purchase in the same manner and pays the same price for the article purchased as he would at the common bar of a saloon, and the transaction is carried on in the same manner as a transaction involving the purchase of a pound of sugar or a can of coffee in a grocery store. He never considers or recognizes that the article purchased is his property, but does recognize that the property is the property of the club, and that he is paying for a distribution of property belonging to himself, but does recognize that the property is the property of the club, and that he is paying for the same in the same manner as he would pay for any article purchased of a mercantile company engaged in that line of business. In the case of *City of Spokane v. Baughman*, 54 Wash. 315m 103 Pac. 14, the Supreme Court of the State of Washington, had under discussion the question of the sale of intoxicating liquor at the Spokane Club, organized for the same general purposes and having the same objects as the appellant club, and says: “Among other accommodations furnished by the Spokane Club for the use of its members and their guests * * * it has main-

tained a room in the club quarters, with one of the regular club employees in charge, where cigars, liquors, wines, beers, and mineral waters are furnished, at charges from time to time fixed by the board of managers of the club. No money is received by the attendant for goods so furnished, but slips are signed by the members, showing the character of the goods furnished and the cost thereof. These slips are turned in by the attendant to the bookkeeper of the club, and are charged to the account of the member, and in due course are paid by him." The language of the ordinance which was alleged to have been violated provides: If any person shall, within the limits of the City of Spokane Falls, sell, dispose of," etc. And the Court says: "When the liquor is bought through the regularly constituted agent of the corporation, it undoubtedly belongs to the corporation, the title as well as the possession, being in the corporation, and it remains there until it is transferred to the buyer for a consideration. Then it becomes the property of the purchaser, and it is at his absolute disposal. He can drink it himself, give it to his guest, or throw it away. The corporation has no further interest in it. In other words it has been paid for, and the transaction, it seems to us, involves all the elements of a sale." [31]

After discussing a number of the cases above cited, the Court adds:

"While there are many other authorities supporting the rule announced in the cases cited and considered above, yet we deem it unnecessary to go into

a further discussion of those cases. We think the weight of authority is with the proposition that where a statute in positive terms prohibits the sale of intoxicating liquors to be drank upon the premises where sold, without first procuring a license, and no exceptions are made excluding clubs organized as corporations, and such corporations are persons under the statute, then all sales made by a person or corporation of whatever character, where no license has been procured, come within the provisions of Rev. Codes, Section 1506."

In discussing a California case which gave weight to the fact that the statute or ordinance under which the prosecution was conducted did not specifically name social clubs, the Court says:

"This objection is very easily answered by saying that if the City of Los Angeles, or any other city, was intended to be excluded from the operation of an ordinance or statute which absolutely prohibits the sale of intoxicating liquors without a license, it is a very simple matter for the city or Legislature to so provide by language that clearly shows such an intent. We cannot agree with the California court or the cases which follow its reasoning. To our mind these cases announcing such a rule have attempted to lay down principles which would shield and protect certain classes selling intoxicating liquors in violation of a statute."

The Court then discussed in detail the cases holding that such transactions do not constitute sales, explaining or criticising the same, and continues:—

"Section 1506, does not require a license only from

those engaged in the business or occupation of selling liquors, but it is made unlawful for any person to sell, whether such person be engaged in the business of selling or not. The person making the sale is not required to be engaged in that particular business. If it is a sale, then a license must be procured under the provisions of the statute, and the Texas case holds such is a sale if it be in a territory where the sale is prohibited. In this State the sale is prohibited where a license is not obtained, and a sale without license is in territory where a sale is prohibited without the same.

Many other cases are cited by counsel for appellant which holds that a club organized for social purposes, such as the Boise Commercial Club, where intoxicating [32] liquors are purchased by the club and dispensed to members, and such disposition of the intoxicating liquors is merely incident to the main objects and purposes of the club, is not subject to revenue license laws, and although the statutes make no mention of the club as being exempt from the provisions of the revenue laws, yet the courts will say that sales made by such clubs are merely distribution of the property of the club to the members to whom it rightfully belongs, and that, therefore, there is no sale. We cannot agree with this line of decisions. In our judgment every single opinion which holds as above indicated, partakes of a disposition and effort on the part of the court to shield the clubs and remove them from the operation of the statutes solely because they are social in character and composed of men who are inclined to promote commercial inter-

ests and business opportunities and social gatherings. To our mind that theory of the application of the law results in a class distinction which is unreasonable and dangerous, and not justified by legislative enactments or common-sense application.

It is also argued on behalf of the appellant that the appellant club has not been called upon to procure a license under the provisions of section 1506 of the Revised Codes since its organization, until a short time before the stipulation of facts was entered into, and that the appellant club was never required by the county or its officials nor by any State official to take out a license under said section, and that such demand has never been made upon any *bona fide* social club or corporation throughout the State—although such clubs and corporations have been in existence and in operation in Ada county and other parts of the State for more than fifteen years, and had furnished and supplied intoxicating liquors in the manner adopted by the appellant club; and because of this policy in carrying out the laws of the State it is claimed that the legislative intent in enacting section 1506 is shown, and that such clubs were not intended to be within the provisions of said section. After section 1506 was enacted, as a law of the State, and in plain, clear and positive language prohibited the sale of intoxicating liquors to be drank on the premises where sold without a license, it was the duty of the proper officers in each county to enforce the law, and collect the revenue provided for in the statute from all persons making sales of liquor in violation of the law, and the mere fact that such

officers have failed to perform their duty will not control this court in giving effect to the plain language of the statute. It is an elementary principle that the neglect or failure of public officers to do and perform their duties as required by law will not estop the public or prevent any rights or acts of the State in enforcing such laws, and we are not inclined to announce as a legal proposition that the failure of the public officials to collect a revenue license where such is required for a number of years will be evidence of the intent of the legislative body in passing such law to exclude from the operation of such statute persons and corporations from whom such officers have failed to collect such revenue license.

We have most carefully gone through and examined the cases cited by both sides in this case, and are [33] thoroughly convinced that under the provisions of section 1506 the question is not in doubt; that the section was intended by the Legislature to prohibit all persons of every kind, nature and description, including corporations of all kinds and natures, from selling intoxicating liquors to be drank on the premises without first procuring a license; and that good reasoning and common-sense makes such a statute applicable and operative as against a corporation, although the sale of intoxicating liquors is a mere incident of the general objects and purposes of the club." See note to this case in 38 L. R. A. (N. S.) 101.

In our view the decided weight of authority and the better reasoning, as shown by the cases above cited and reviewed, are that such transactions as we

are discussing, notwithstanding some of the text books to the contrary, constitute SALES of intoxicating liquors within the meaning of the license laws, many of the statutes construed being not nearly so plain and unambiguous as our own statute.

Permit us to close this branch of the argument by quoting a pertinent paragraph from Judge McPherson's opinion in *United States v. Alexis Club*, 98 Fed. 725, in which he holds that such transactions constitute sales:

“If the result I have reached is correct, I believe it to be in the line of enforcing equality before the law; and equality before the law is a principle of American society, than which there is none more vital. Privilege and a privileged class are, and ought to be, intolerable; and it comes irritatingly near to a privilege where social clubs offering advantages of comfort and luxury that are only within the reach of the more prosperous, escape a share of the public burdens, because a refined reasoning declares that they are doing no more than distributing a common stock of liquors among their members, while the robust sense of the community, not excluding the club members themselves, know the transactions to be a sale.”

SECOND QUESTION INVOLVED.

IF SUCH TRANSACTIONS DO CONSTITUTE SALES, THEN, DO SUCH SALES BY SAID “ENI” CLUB WITHOUT FIRST HAVING SECURED A BARROOM LICENSE CONSTITUTE A VIOLATION OF SECTION 2581 OF

THE COMPILED LAWS OF THE TERRITORY OF ALASKA?

We are of the opinion, that, aside from the decisions cited, there are three other things that are absolutely [34] controlling in this jurisdiction in the construction of this license law, FIRST, the language of the law itself which precludes any other construction than that such sales are in violation thereof, SECOND, the decisions of the Federal Courts construing the Internal Revenue Laws, the said courts without exception holding that such transactions constitute the clubs or persons dispensing the liquor, retail liquor dealers, within the meaning of those laws, and THIRD, the construction by the Courts of a similar statute passed by Congress, prior to the passage of the Act in question.

Of these in order:—

FIRST: The language of the statute is "*that no person, corporation, or company, shall sell, offer for sale or keep for sale, traffic in, barter, or exchange for goods * * * any intoxicating liquors*" etc. Now the term "person" in law, is almost universally held to include corporations, partnerships and associations, but to remove all doubt or question, Congress added the words "corporation or company." Now the word "company" in a statute, has often been held to mean and include corporations, partnerships, and voluntary associations of individuals, of all or any kind. See the cases cited in "Words and Phrases" under the head "Company." There can be no reasonable doubt but that the word "company," as used in this Act, was meant to and does include all

voluntary associations of individuals.

Again, the statute says that “a retail or barroom license shall be required for every hotel, tavern, boat, barroom, or *other place* in which intoxicating liquors are sold at retail.” And again, “That *every place* where * * * liquors * * * are sold * * * *to be drunk upon the premises, shall be regarded as a barroom,*” and further, that the possession of liquors “with the means and appliances [35] for carrying on the business of dispensing the same *to be drunk where sold, shall be prima facie evidence of a barroom* within the meaning of the Act, *and the license therefor shall be known as a barroom license.*”

The language of this Act is so plain that we can hardly assume that any one in good faith will contend that an association of individuals may purchase liquors, prepare a place for dispensing the same to be drunk upon the premises, and charge the *individual* ordering the same a price practically equal to that charged by the admitted and confessed barrooms of the city, without being subject to the license laws of the Territory, but such is the position taken by counsel for the defendants.

They argue that only those persons, corporations and companies who are required to have a license by the sections preceding Section 2581, are prohibited by said last named section to sell intoxicating liquors without a license. However, the *falacy* lies in their assumption that the preceding sections *do not require* all persons, corporations and companies to have a license. When the statute (Section 2571) says “*No person, corporation or company, shall sell, offer*

for sale, or keep for sale, traffic in, barter or exchange for goods in said District of Alaska, any intoxicating liquor," except as thereafter provided, the prohibition is universal, and the inhibition is placed upon every individual and conceivable combination of individuals, and the only possible avenue of escape therefrom by defendants is *through the exception clause*. Does the exception clause—"except as hereinafter provided" cover a combination of individuals such as the "Eni" Club? What exceptions are thereafter provided by the statute? Just three classes, viz., (1) Druggist and apothecaries; (2) [36] Sales under provisions of law, such as marshal's sales, administrator's sales, etc., and (3) Sales by those who have applied for and secured a license to sell.

It cannot be claimed by the defendants that their club comes within either the first or second classes excepted from the prohibition. It follows, therefore, that defendants' club must come under the third exception, to wit, the provision providing for the application for and securing of a license, or it is absolutely prohibited from selling at all.

However, in our opinion, the words of said statute: "No person, corporation or company shall sell" etc., "except as hereinafter provided" should be construed to mean the same as if they read "Any person, corporation or company may sell, etc., upon a compliance with the following provisions and not otherwise." In other words the statute means that no person, corporation or company be prohibited absolutely

from selling intoxicating liquors but only conditionally, that is the prohibition applies until such person, corporation or company applies for and secures a license in accordance with the provisions of the statute following the provision, "*except as hereinafter provided,*" above referred to. Hence, defendants' club is forbidden to sell intoxicating liquors until it applies for and secures a license. The statute contemplates that every person, corporation or company shall apply for and secure a license before such person, corporation or company is allowed to sell. It says in plain and simple language that no person, corporation or company shall sell until it has complied with the provision requiring a license. [37]

Our contention is that Section 2581 is as broad as Section 2571; that every one who is forbidden to sell without a license by Section 2571 is subjected to a penalty as prescribed by Section 2581. Any other construction of Section 2581 would destroy the partial effect of Section 2571. The evident intent of Section 2581 is that "any person (except druggists and apothecaries and persons making sales under provisions of law requiring them to sell personal property) who shall sell intoxicating liquors, without first having obtained a license so to do, shall upon conviction thereof be fined etc." Said Section 2581 provides that "Any one engaging in the sale of intoxicating liquors * * * , *who is required by it* (this act) *to have a license as herein specified*, without first having obtained a license to do so as herein provided, * * * upon conviction thereof shall be fined. etc." Now the relative clause "*who is re-*

quired by it to have a license as herein specified” is either *explanatory* or *restrictive*, that is it either expresses some attribute of its antecedent “anyone” or it restricts the application of such antecedent. The rule is that explanatory or appositive clauses should be set off by commas while restrictive clauses should not be so set off. Applying, therefore, the rules of grammatical construction, the said clause is merely explanatory and is not intended to restrict the application of its antecedent to a *particular class of persons who sell liquor without a license*. Implying that there are other persons who sell without a license to whom it does not apply. Let me illustrate: If I say “Roman citizens, who are patriotic, should avenge the death of Caesar,” and place the clause “*who are patriotic*” within commas, said clause is appositive or explanatory and the sentence means [38] that all Roman citizens are patriotic and should avenge the death of Caesar. But on the other hand if I use the same identical words but leave out the commas, the clause, “*who are patriotic*” is restrictive and limits its antecedent citizens to the patriotic class of Roman citizens, and implies that there is a class of Roman citizens who are not patriotic, and the sentence would mean merely that patriotic Roman citizens should avenge the death of Caesar. Now, applying the same rule of grammatical construction to said section 2581, the words “Any one engaging etc., *who is required by it to have a license as herein provided*,” means that “every one engaging, etc., is required by it to have a license as herein provided.”

There are other reasons why said section 2581

should be construed to be as broad as said section 2571. They are parts of the same Act and should be construed in the light of every other portion of the Act. A consideration of section 2577 of the same Act will illumine the matter under consideration. Said section 2577, *inter alia*, provides,—“That a retail or barroom license shall be required of every hotel, tavern, boat, barroom, or *other place* in which intoxicating liquors are sold at retail.” We are assuming in this part of our argument that the transactions by which members of defendants’ club are furnished intoxicating liquors *constitute a sale*, having argued that matter under the first question presented in this brief. Assuming, therefore, that the transactions complained of by plaintiff constitute a *sale*, there can be no question that they constitute a sale *at retail*, and a retail or barroom license is required therefor by the above provisions of said section 2577. The language of the section is that “*every barroom or other place* where intoxicating liquors are sold at retail,” must secure [39] a barroom or retail license. If defendants’ club is a *barroom*, the declaration is specific that it must have a license. If defendants’ club is *any other place* where intoxicating liquors are sold at retail, the declaration is equally specific that it must have a license. But Congress has gone further in this same section, 2577, and has defined a “*barroom*” as *every place where distilled, malt or fermented wines, liquors or cordials are sold in quantities as prescribed for retail dealers by section 3244 of the Revised Statutes of the United States, to be drunk upon the premises.*” Under this definition, defend-

ants' club is unquestionably a *barroom*; but the said section goes another step further and make the possession of such liquors with the appliances for drinking the same where sold *prima facie* evidence that such place is a *barroom*. Assuming that the transactions complained of constitute a sale, can any one doubt that the status of defendants' club is fixed by said section 2577 as a *barroom*? Can any one mistake the meaning of this section when it says "that a retail or barroom license is required of every * * * barroom, etc?"

Since the defendants' club is a barroom and every barroom is required to have a license, it follows that defendants' club is required to have a license by said section 2577. In fact every place where intoxicating liquors are sold at retail must have a retail barroom license, whether such sale is made by a person, a corporation or a company. The nature of the business determines whether or not the license is required, not the nature of the agency which makes the sale. Every place must secure a license whether it is an aristocratic club or a democratic saloon, both are barrooms in the eyes of the law. [40]

Now, if every place where intoxicating liquors are sold at retail is required to have a license irrespective of who runs the place, it follows that *every one* is required to have a license before engaging in such sale. This is the irresistible conclusion from said section 2577.

Reading said section 2581 in the light of said section 2577, we would ask in the words of the explanatory clause of said section 2581, "Who is required by

it (the statute) to have a license as herein specified"? And the answer is "every one who sells at retail" which necessarily includes defendants' club. Hence, if defendants' club sells intoxicating liquors without first having secured a license so to do, being required by said section 2577 to have a license, it is amenable to said section 2581, and its members, agents and officers are guilty of a misdemeanor.

But counsel for defendants say that said section 2581 applies only to persons, corporations and companies who are required by other provisions of the Act to have a license, and that since voluntary associations, or social clubs are not expressly mentioned, *eo nomine*, by the statute, their club is not required to have a license. In other words they assert that said section 2581 contemplates at least two classes who sell intoxicating liquors without a license, those who are required by the terms of the Act to have a license, and those who are not so required and that it is only the first of these classes who can be *punished*.

What is the chief argument in support of such a construction? Is it that the form of the petition for a license, prescribed by section 2574, for a *person* is not adapted to the use of defendants' club; that the requirements that the applicant shall state in such petition that he will conduct the business himself and not as agent for another person, and [41] that he will superintend in person the management of the business, and perhaps some others, are statements that defendants' club, having no legal entity, could not make. But the same objection could be

advanced on behalf of any corporation, co-partnership or aggregation of persons. The form of petition prescribed by the statute is adapted only for the application of a single person, *but it does follow that it cannot be modified in form to meet the requirements of other classes of applicants?* If corporations, or companies could not under said section 2574 apply for licenses, we can hardly divine the purpose of embodying them in section 2571 wherein they are prohibited from selling intoxicating liquors *except as in said act thereafter provided.*

No corporation can take an oath or superintend or conduct a business personally. Its very nature precludes it from acting except by its officers and agents; a partnership or other aggregation of persons could do no more, they must act as individuals or by their agents and not otherwise. Are we to advise this Court, therefore, that neither a corporation nor co-partnership is required by our license laws to apply for and secure a license before engaging in the sale of intoxicating liquors?

The contrary has been the practice of this Court. Corporations and co-partnerships have always applied for and secured licenses to sell intoxicating liquors under said section 2574, notwithstanding the inadaptability of the prescribed form of petition to the nature of such corporation or co-partnership. At the present time there are three co-partnerships and one corporation here in Nome, which are licensed to sell intoxicating liquors at retail, namely, Stadie and Hill; Caldwell and Wettergren and

Young and Van Sickle [42] co-partnerships, and the Seward Commercial Company, a corporation, said last corporation holding a wholesale license also. We submit that when an officer of the corporation or a member of a co-partnership makes and files a petition on behalf of his corporation or co-partnership complying with the prescribed form of petition to the extent that the nature of the application will permit, that the same is all that is contemplated by said section 2574. And such has been the uniform holding of this court as is evidenced by the licenses now issued to corporations and co-partnerships.

Let us trace counsels' contention to its final analysis. What would it mean for this court to hold that defendants' club (an aggregation of individuals) cannot apply for and secure a license to sell intoxicating liquors because the form of application prescribed by statute for a *person* is not adapted for the application of any other *class* of applicants? It would mean that the Seward Commercial Co., a corporation, which is now paying to the Clerk of this Court for both wholesale and retail liquor licenses annually the sum of \$3,000.00, would never pay another cent; it would mean that Stadie and Hill, Caldwell and Wettergren and Young and Van Sickle, who are now each paying the sum of one thousand dollars annually to the Clerk of this Court, would find other uses for their money; but each and all of them would continue to do business at the old stand without fear of molestation from the collector

of license fees, or of prosecutions by the United States Attorney.

And this is not the whole of the result of such a ruling. Every saloon man in this Division would immediately form either a corporation or a co-partnership, and thereby [43] exempt himself from the license requirement of the statute. Why should they pay a large annual license fee to the Government, if corporations and companies can engage in the same business free?

Counsels' argument reduces itself to an absurdity for it is certainly absurd to argue that it was the intention of Congress in enacting a revenue law to provide so patent an opening for the complete evasion and nullification thereof.

SECOND: The decisions of the Federal Courts:

As above stated, the Federal Courts without exception, so far as we have been able to find, hold that the dispensing of liquors by clubs, associations, etc., whether incorporated or not, constitute them retail liquor dealers and subject to the license tax prescribed by the internal revenue laws. These courts brush aside with scant courtesy the subterfuges and specious pleas that such transactions do not constitute sales. See—

U. S. v. Wittig, 28 Fed. Cases, 744;

U. S. v. Giller, 54 Fed. 656;

U. S. v. Alexis Club, 98 Fed. 725;

U. S. v. Woods, Fed. Cases No. 16,759;

U. S. v Roliger, Fed. Cases No. 16,190a.

It should be noted that the first three cases cited are from courts sitting in states in which the State

courts have held such clubs and associations not subject to the license laws of the State, that of Judge Lovell in *U. S. v. Wittig*, sitting in the District Court of Massachusetts, that of Judge Philips, sitting in the Western Dist. of Missouri, in *U. S. v. Giller*, and that of Judge McPherson, sitting in the Eastern District of Pennsylvania in the case of *U. S. v. Alexis Club*.

In *U. S. v. Roliger*, *supra*, a number of persons united themselves together into a voluntary association [44] for the purpose of providing themselves with whiskey and beer as they wanted it, charging a membership fee out of which the first stock of liquors were purchased. This liquor was furnished to members at a price fixed by a committee and the funds arising therefrom were used in replenishing the stock of liquors and in the payment of expenses. No profits were made.

“The Court (Treat, District Judge) instructed the jury that under the facts, as stated, each member of the association was liable for carrying on business as retail liquor dealer without paying the special tax, and the fact that the business was being carried on without any attempt to make a profit out of it made no difference, as the law requires those who sell or offer for sale malt or spirituous liquors, shall pay the special tax, without reference to whether the selling or offering for sale is done for the sake of profit or not; and the fact that none but members of the association were allowed to partake of the liquor made no difference. The association was a partnership, in which all the members seem

to have been *equal* partners, and liquors, when purchased in bulk, belonged to the partnership; but when the individual partner went to the clerk of the concern, and obtained from him a drink of the partnership liquor, and paid the clerk for that drink at the price fixed, that was a purchase of so much liquor from the partnership, and it was a sale of so much liquor by the partnership to this individual partner, and for so carrying on business the partnership should have paid a special tax as retail liquor dealers, and having failed and refused to do so, each member of the partnership became liable to the criminal provision of the law.

In *United States v. Wittig*, *supra*, the essential facts are identical with the case at bar. The Court says:

“There seems to be no doubt that the club sells beer to its members? Every element of a sale is present; the delivery of the beer on the one part, and the payment on the other. It was argued that at common law, a man cannot buy of himself and others. This is a mistake. The common law recognizes such a sale, though, if the contract is executory, the common law has no mode of enforcing it. * * *

“If I am right in saying that the beer is sold by the club to its members, the club is within section 18, (Sec. 3244 R. S.) above referred to, and the question is whether the generality of these words is to be restricted by a consideration of the subject-matter or by the words of Section 16 (3242 R. S.), which speaks of the same persons as dealers and as those ‘who shall carry on the business,’ etc.” If the ques-

tions were merely whether the club carries on the [45] business of beer selling there would seem to be great doubt; but section 18 appears to be intended to define such dealers with as much exactness as may be, and, if so, the ordinary definition of dealers, or persons carrying on a business is of no importance."

"This is a revenue law, and the decisions of the Supreme Court require us to construe it liberally in favor of the revenue, to prevent evasions. So construed, I think it must be held that any course of selling though to a restricted class of persons and without a view to profit, is within its meaning."

Applying the same reasoning to section 2577 of the Compiled Laws of Alaska, we may say that said section having defined a *barroom* and required a license therefor, the ordinary definition of barrooms or of persons engaged in the business of selling liquor at retail is of no importance. The statute settles the matter beyond cavil.

These decisions are, we think, controlling in this jurisdiction in the construction of said license statute.

THIRD: The construction by the courts of a similar statute passed by Congress, before our license law was enacted:

It is a familiar rule of construction that the adoption of a law previously adopted by another state or jurisdiction, adopts also the construction put upon that law by the courts of such other state or jurisdiction.

The Alaska license law was passed by Congress

in 1899, 30 Statutes at Large 1335–13,341. The sections and paragraphs we are construing were taken from “An Act regulating the sale of intoxicating liquors in the District of Columbia,” passed by Congress March 3, 1893 (See 27 St. at L., p. 563). A comparison of Sections 1 and 8 of said Act with sections 2571 and 2577 of the Compiled Laws of Alaska, shows that the paragraphs we are construing were [46] adopted from the said District of Columbia Act. Section 2571 of the Alaska Act is identical with Section 1 of the District of Columbia Act, *except* that in the Alaska Act the words “corporation or company” are inserted after the word “person” and “District of Alaska” is substituted for District of Columbia. The parts of Section 2577 of the Alaska Act above quoted are taken word for word from Section 8 of the District of Columbia Act.

Now, prior to the passage by Congress of the Alaska Act applying the District of Columbia Act to the District of Alaska, the highest court in the District of Columbia had construed said Act in its application to clubs. In *Army and Navy Club v. District of Columbia*, the Court of Appeals of the District held that the said license law was applicable to said club. (See 8 App. D. C. 544.) We have not the text of this decision, as these reports are not in the city. The case was decided in 1896 (See Am. Dig. 1896, Pt. 1). In this case “it was held that a social club, with a limited membership, organized for the maintenance of a library and for social purposes, which dispenses wines and liquors to its mem-

bers according to a tariff of rates sufficient to replenish the stock and provide for the necessary expenses of the club, but not sufficient to pay any profit to its members, was a *barroom subject to the license fee.*” (See Note to *South Shore Country Club v. People*, 12 L. R. A. (N. S.) 521.)

Note that this decision was rendered in 1896, while Congress did not adopt and apply this Act to the District of Alaska, until 1899. Now, following the canon of statutory construction above stated, it must be conclusively presumed that Congress in applying said Act to the District [47] of Alaska, adopted the construction given to it by the highest court of the District of Columbia. But apparently to remove all question, Congress inserted the words “corporation or company” after the word “person” in said District of Columbia Act, in applying said Act to the District of Alaska.

Upon consideration of the whole matter we are of the opinion that the question is not in doubt; that such clubs as we are considering are clearly subject to the license laws of the Territory, and consequently all members of the club are liable to prosecution and to loss of reputation and property interests if the defendants are not restrained from further violations of the law. Hence, the demurrer to the amended complaint should be overruled and the

prayer of the complaint granted.

Respectfully submitted,

F. M. SAXTON,

U. S. Attorney.

N. A. PEERY,

Assistant U. S. Attorney.

Amici Curiae.

[Endorsed]: Original No. 2514. In the District Court for the District of Alaska, Second Division. E. Chas. Elwood, Plaintiff, vs. John H. Mustard et al., Defendants. Brief of U. S. Attorney as *Amicus Curiae*. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 23, 1914. John Sundback, Clerk. By J. A. B., Deputy. Refiled as the Opinion of the Court by order of the Court, in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, May 23, 1914. J. Sundback, Clerk. By J. A. B., Deputy. [48]

*In the District Court for the District of Alaska,
Second Division.*

E. CHAS. ELWOOD,

Plaintiff,

VS.

JOHN H. MUSTARD, FRED AYER and S. W.
TAGGART,

Defendants.

Judgment on Demurrer.

Now, on this 23d day of May, 1914, this cause com-

ing on in open court for a decision upon the demurrer of the defendants to the amended complaint herein, the plaintiff appearing by J. F. Hobbes, Esq., his attorney, the defendants by G. J. Lomen and O. D. Cochran, Esqrs., and F. M. Saxton, United States Attorney and N. A. Peery Assistant United States Attorney appearing as *amici curiae*, and the Court having heretofore heard the arguments of counsel and being now fully advised in the premises;

IT IS HEREBY ORDERED, ADJUDGED and DECREED that said demurrer be, and the same hereby is overruled.

And it appearing to the Court that counsel for the defendants except to said ruling, elect to stand on their demurrer and do not desire to plead further in this case, and that plaintiff is entitled to a judgment and decree in accordance with the amended complaint herein;

IT IS THEREFORE FURTHER ORDERED, ADJUDGED and DECREED that the defendants, John H. Mustard, Fred Ayer, and S. W. Taggart, together with all other members [49] of the club mentioned in the amended complaint herein and known as the "Eni Club," their and its successors, officers, agents, servants and employees be, and they hereby are, and each of them is forever enjoined and restrained from selling, furnishing or delivering to the members (present or prospective) of said "Eni Club" or to any thereof, or to any other person or persons, intoxicating liquors in exchange for a valuable or any consideration, either in the manner alleged in the amended complaint herein, or otherwise,

without first having been granted a retail liquor license so to do.

J. R. TUCKER,
District Judge.

[Endorsed]: No. 2514. In the District Court, District of Alaska, Second Division. E. Chas. Elwood, Plaintiff, vs. John H. Mustard, et al., Defendants. Judgment on Demurrer. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 1, 1914. John Sundback, Clerk. By J. A. B., Deputy. Vol. 10. Orders & Judgments, p. 500. C. [50]

*In the District Court for the District of Alaska,
Second Division.*

E. C. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD, SAM J. TAGGART and
FRED AYER,

Defendants.

Assignment of Errors.

Come now the defendants John H. Mustard, Sam J. Taggart and Fred Ayer, and assign the following errors upon which they will rely in prosecuting their appeal from the final judgment in the above-entitled action, to the Circuit Court of Appeals for the Ninth Circuit.

FIRST. The Court erred in overruling the demurrer of the defendants John H. Mustard, Sam J.

Taggart and Fred Ayer, to the amended complaint herein.

SECOND. The Court erred in filing and entering its final decree and judgment in said action in favor of said plaintiff and against the defendants, over the objection of defendants.

WHEREFORE said defendants pray that said judgment of the District Court for the District of Alaska, Second Division, be reversed and set aside.

G. J. LOMEN,

Attorney for Defendants. [51]

Due service of the foregoing assignment of errors is hereby acknowledged at Nome, Alaska, by receipt of copy this 17th day of October, 1914.

J. F. HOBBS,

Attorney for Plaintiff.

[Endorsed]: No. 2514. In the District Court for the District of Alaska, Second Division. E. C. Elwood, Plaintiff, vs. John H. Mustard, et al., Defendants. Assignment of Errors. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 17, 1914. G. A. Adams, Clerk. By ———, Deputy. L. G. J. Lomen, Attorney for Defendants. [52]

*In the District Court for the District of Alaska,
Second Division.*

E. C. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD, SAM J. TAGGART and
FRED AYER,

Defendants.

Petition for an Order Allowing an Appeal.

Come now the defendants above named, and feeling themselves aggrieved by the final judgment and decree made and entered in the above-entitled cause on the 1st day of June, 1914, in favor of said plaintiff and against said defendants, do hereby appeal from said final judgment and decree, and from the whole and every part thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that this their appeal may be allowed. That a transcript of the proceedings upon which the said judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Defendants further pray for an order fixing the amount of costs and appeal bond to be given by said appellants upon said appeal.

Dated at Nome, Alaska, this 17th day of October, 1914.

G. J. LOMEN,

Attorney for Defendants. [53]

Service of the above and foregoing petition is hereby admitted by receipt of copy this 17th day of October, 1914.

J. F. HOBBS,
Attorney for Plaintiff.

[Endorsed]: No. 2514. In the District Court for the District of Alaska, Second Division. E. C. Elwood, Plaintiff, vs. John H. Mustard et al., Defendants. Petition for an Order Allowing Appeal. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 17, 1914. G. A. Adams, Clerk. By ———, Deputy. L. G. J. Lomen, Attorney for Defendants. [54]

*In the District Court for the District of Alaska,
Second Division.*

E. C. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD, SAM J. TAGGART and
FRED AYER,

Defendants.

Order Allowing Appeal and Fixing Amount of Bond.

Upon motion of G. J. Lomen, attorney for defendants above named, it is

ORDERED That an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment and decree heretofore filed and entered upon the 1st day of June, 1914, be, and is hereby allowed, and that a certified transcript of the records, orders and proceedings herein, be forthwith

transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and it is further

ORDERED that a bond be given by the defendants to the plaintiff in the sum of two hundred and fifty dollars.

Done in open court this 17th day of October, 1914.

J. R. TUCKER,

District Judge.

Service of the above order is hereby admitted by receipt of copy, this 17th day of October, 1914.

J. F. HOBBS,

Attorney for Plaintiff. [55]

[Endorsed]: No. 2514. In the District Court for the District of Alaska, Second Division. E. C. Elwood, Plaintiff, vs. John H. Mustard et al., Defendants. Order Allowing Appeal and Fixing Amount of Bond. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 17, 1914. G. A. Adams, Clerk. By ———, Deputy. L. G. J. Lomen, Attorney for Defendants. [56]

*In the District Court for the District of Alaska,
Second Division.*

E. C. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD, SAM J. TAGGART and
FRED AYER,

Defendants.

Undertaking.

KNOW ALL MEN BY THESE PRESENTS, That we, John H. Mustard, Sam J. Taggart, and Fred Ayer, as principals, and G. R. Jackson and Andrew Anderson, sureties, are held and firmly bound unto the plaintiff above named, in the sum of two hundred and fifty dollars, to be paid to the said plaintiff, his heirs, executors or assigns, the payment of which well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators and assigns, firmly by these presents.

Sealed with our seals, and dated this 17th day of October, 1914.

The condition of the above undertaking and obligation is,

THAT WHEREAS the above-named defendants John H. Mustard, Sam J. Taggart and Fred Ayer have filed their petition for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled action rendered by the District Court for the District of Alaska, Second Division, on the 1st day of June, 1914; [57]

THEREFORE, if the above-named defendants John H. Mustard, Sam J. Taggart and Fred Ayer, shall prosecute the said appeal to effect, and answer all costs and damages if they fail to make good their appeal, and shall pay or cause to be paid to the said plaintiff, his heirs, administrators and assigns, all damages which he shall suffer by reason of said ap-

peal if the same should be wrongful or without sufficient cause; then this obligation to be void, otherwise to remain in full force and effect.

JOHN H. MUSTARD,
SAM J. TAGGART,
FRED AYER,

Principals.

By G. J. LOMEN,

Their Attorney.

G. R. JACKSON,
ANDREW ANDERSON,

Sureties.

* * * * *

United States of America,
District of Alaska,—ss.

G. R. Jackson and Andrew Anderson being first duly sworn, each for himself, deposes and says:

That I am one of the sureties named in the above undertaking, and am a resident of the District of Alaska, [58]

That I am not an attorney at law, marshal, deputy marshal, clerk of any court, or other officer of any court, and am worth the sum of five hundred dollars over and above all just debts and liabilities, and exclusive of property exempt from execution.

G. R. JACKSON,
ANDREW ANDERSON,

Subscribed and sworn to before me this the 17th day of October, 1914.

[Notarial Seal]

G. J. LOMEN,
Notary Public in and for the District of Alaska.

My commission expires on the 27th day of June, 1917.

* * * * *

ORDERED that the above and foregoing undertaking, and the sureties therein named, are hereby approved this 17th day of October, 1914.

Done in open court this 17th day of October, 1914.

J. R. TUCKER,

District Judge. [59]

[Endorsed]: No. 2514. In the District Court for the District of Alaska, Second Division. E. C. Elwood, Plaintiff, vs. John H. Mustard et al., Defendants. Undertaking. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 17, 1914. G. A. Adams, Clerk. By _____, Deputy. _____, Attorney for Defendants. Civil Bond Record Vol. 5, page 382. [60]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

E. C. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD, SAM J. TAGGART and
FRED AYER,

Defendants.

Praecipe (for Certified Copy of Record).

TO THE CLERK OF THE ABOVE-ENTITLED
COURT:

YOU WILL PLEASE make and send to the Clerk of the Circuit Court of Appeals certified copy of record in the above-entitled action, including summons, amended complaint, demurrer, judgment, opinion and minute order sustaining demurrer, also of all appeal papers; also original citation and order enlarging time to file record on appeal.

G. J. LOMEN,

Attorney for Defendants.

[Endorsed]: No. 2514. In the District Court for the District of Alaska, Second Division. E. C. Elwood, Plaintiff, vs. John H. Mustard et al., Defendants. *Praecipe*. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 17, 1914. G. A. Adams, Clerk. By _____, Deputy. L. G. J. Lomen, Attorney for Defendants. [61]

*In the District Court for the District of Alaska,
Second Division.*

No. 2514.

E. CHAS. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD, FRED AYER and S. W.
TAGGART,

Defendants.

[**Certificate of Clerk U. S. District Court to
Transcript of Record.**]

I, G. A. ADAMS, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 61, both inclusive, are a true and exact transcript of the Summons, Amended Complaint, Demurrer, Court Minutes of May 23, 1914 (Overruling demurrer, etc.), Opinion, Judgment on Demurrer, Assignment of Errors, Petition for an Order Allowing Appeal, Order Allowing Appeal and Fixing Amount of Bond, Undertaking, and *Praecipe* for Transcript on Appeal, in the case of E. Chas. Elwood, Plaintiff, vs. John H. Mustard et al., Defendants, No. 2514 Civil this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify that the Original Order Enlarging Time to File Record and the Original Citation in the above-entitled cause are attached to this transcript.

Cost of transcript \$19.80, paid by G. J. Lomen, of attorneys for defendants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 24th day of October, A. D. 1914.

G. A. ADAMS,
Clerk. [62]

In the District Court for the District of Alaska, Second Division.

No. —.

E. C. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD, SAM J. TAGGART and
FRED AYER,

Defendants.

**Order Enlarging Time to File Record to December
15, 1914.**

On motion of G. J. Lomen, attorney for defendants above named, and good cause appearing to the Court therefor, it is hereby

ORDERED That the time for filing and docketing the transcript and record in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, is hereby extended to and until the 15th day of December, 1914.

Done in open court this the 17th day of October, 1914.

J. R. TUCKER,
District Judge.

Service of the foregoing order is hereby admitted this 17th day of October, 1914.

J. F. HOBBS,
Attorney for Plaintiff. [63]

[Endorsed]: No. 2514. In the District Court for the District of Alaska, Second Division. E. C. Elwood, Plaintiff, vs. John H. Mustard et al., Defendants. Order Enlarging Time to File Record. [64]

In the District Court for the District of Alaska, Second Division.

No. —.

E. C. ELWOOD,

Plaintiff,

vs.

JOHN H. MUSTARD, SAM J. TAGGART and
FRED AYER,

Defendants.

Citation [on Appeal (Original)].

United States of America,
District of Alaska,—ss.

The President of the United States of America,
to E. C. Elwood, Plaintiff, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this citation, to wit; on the 16th day of November, 1914, pursuant to an order allowing appeal, entered in the office of the Clerk of the United States District Court for the District of Alaska, Second Division, from the final judgment and decree filed and entered therein on the 1st day of June 1914, in that certain suit wherein you, the said E. C. Elwood was plaintiff, and John H. Mus-

tard, Sam J. Taggart and Fred Ayer were defendants, to show cause, if any there be, why the said final judgment and decree rendered against said defendants, in said order allowing appeal mentioned, should not be corrected and why speedy justice should [65] not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 17th day of October, 1914.

J. R. TUCKER,
District Judge.

Attest my hand and seal of the United States District Court, for the District of Alaska, Second Division, at the Clerk's office at Nome, Alaska, this 17th day of October, 1914.

[Seal] G. A. ADAMS,
Clerk of the United States District Court, for the
District of Alaska, Second Division.

Service of the above and foregoing Citation is hereby acknowledged by receipt of Copy, this 17th day of October, 1914.

J. F. HOBBS,
Attorney for Plaintiff. [66]

[Endorsed]: No. 2514. In the District Court for the District of Alaska, Second Division. E. C. Elwood, Plaintiff, vs. John H. Mustard et al., Defendants. Citation. [67]

[Endorsed]: No. 2513. United States Circuit Court of Appeals for the Ninth Circuit. John H. Mustard, Sam J. Taggart and Fred Ayer, Appellants, vs. E. C. Elwood, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Received and filed November 10, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

E. CHAS. ELWOOD,
Plaintiff and Appellee,
vs.
JOHN H. MUSTARD, FRED AYER
and S. W. TAGGART,
Defendants and Appellants.

**APPEAL FROM THE DISTRICT COURT OF ALASKA,
SECOND DIVISION, HON. J. R. TUCKER,
DISTRICT JUDGE.**

Brief of F. M. SAXTON, United States Attorney for
the Second Division of Alaska, on behalf of United States
as *Amicus Curiae*.

NOME, ALASKA.

Filed this.....day of January, A. D. 1915.
F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

Filed

FEB 1 - 1915

F. D. Monckton,

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. CHAS. ELWOOD,	}
<i>Plaintiff and Appellee,</i>	
vs.	
JOHN H. MUSTARD, FRED AYER and S. W. TAGGART,	
<i>Defendants and Appellants.</i>	}

APPEAL FROM THE DISTRICT COURT OF
ALASKA, SECOND DIVISION.

Hon. J. R. TUCKER, Judge.

BRIEF OF AMICUS CURIÆ

Comes now F. W. Saxton, United States Attorney for the Second Division of Alaska, on behalf of the United States as *amicus curiae*, and by direction of the Attorney-General of the United States, and the permission of the above entitled court first had and received, files this brief, and requests that John W. Preston, United States Attorney for the Northern District of California, be permitted to make the oral ar-

gument on behalf of the United States at such time as the said cause may be argued orally.

STATEMENT OF THE CASE

This action was instituted by the plaintiff on behalf of himself and a minority of the members of the "Eni", or "Log Cabin Club", for the purpose of testing the right of said club to furnish intoxicating liquors to its members without first having applied for and secured a barroom license to sell intoxicating liquors at retail. The facts are stated in the amended complaint and are admitted by the demurrer thereto. This court overruled the demurrer, and the defendants declining to further plead, rendered judgment and decree in accordance with the prayer of the amended complaint. Defendants have appealed, assigning as error the overruling of their demurrer, and the entering of judgment and decree thereon.

The court's jurisdiction of the subject matter of this action was conceded by all parties to the action in the court below, and assuming that the same will be conceded here, there are but two questions to be considered and decided:

First. Do the transactions complained of constitute SALES of intoxicating liquors; and,

Second. If such transactions do constitute SALES, then do such SALES by said "Eni" club without first having secured a barroom license constitute a violation of Section 2581 of the Compiled Laws of the Territory of Alaska?

We will consider these questions in their order, but will state the first a little more broadly, thus:

AN UNINCORPORATED SOCIAL CLUB ORGANIZED FOR THE ENTERTAINMENT AND PLEASURE OF ITS MEMBERS PURCHASES INTOXICATING LIQUORS WITH THE COMMON FUNDS OF THE CLUB AND DISPENSES THE SAME TO ITS MEMBERS AND GUESTS TO BE DRUNK UPON THE PREMISES, CHARGING THEREFOR A PRICE PER DRINK, OR BOTTLE, FIXED BY THE GOVERNING POWERS OF THE CLUB, IS SUCH A TRANSACTION A SALE WITHIN THE MEANING OF THE LICENSE LAWS OF THE TERRITORY?

The Compiled Laws of Alaska of 1913, provide:

Section 2571: "That no person, corporation or company shall sell, offer for sale, or keep for sale, traffic in, barter, or exchange for goods in said District of Alaska, any intoxicating liquors, except as hereafter provided. * * * Wherever the term 'intoxicating liquors' is used in this Act, it shall be deemed to include whiskey, brandy, rum, gin, wine, ale, porter, beer, hoochinoo, and all spirituous, vinos, malt, and other fermented or distilled liquors."

Section 2577: "That the liquor licenses authorized and provided by this Act shall be of two classes, namely, wholesale and barroom. * * * That a retail or barroom license shall be required for every hotel, tavern, boat, barroom, *or other place* in which intoxicating liquors are sold at retail * * *. That every place where distilled, malt, or fermented wines, liquors, or cor-

dials *are sold* in quantities as prescribed for retail dealers by Section thirty-two hundred and forty-four of the Revised Statutes of the United States, *to be drunk upon the premises, shall be regarded as a barroom*, and the possession of malt, distilled, fermented, or any other intoxicating liquors with the means and appliances for carrying on the business of dispensing the same to be drunk where sold, shall be *prima facie* evidence of a barroom within the meaning of this Act, and the license therefor shall be known as a barroom license * * *

Section 2581: "That any one engaging in the sale of intoxicating liquors, as specified in this act, in the District of Alaska, who is required by it to have a license as herein specified, without first having obtained a license to do so as herein provided, or any person who shall engage in such sale in any portion of the District where the sale thereof is prohibited, upon conviction thereof shall be filed * * *

The Act above set out is so plain and unambiguous that it would appear to come within the class of laws which the courts say "need no interpretation".

There is, however, an irreconcilable conflict of authority in the construction of similar statutes, or rather in the construction of the license laws of the various states as applied to such associations or clubs. Many of the decisions upholding the right of such clubs to dispense liquors to their members without the payment of the license required for retail dealers are based upon the particular wordings of the statutes construed, and one, the Pennsylvania case hereinafter cited, gave serious consideration to the fact that the club had been in existence for many years, a fact well

known to the legislature, and that the legislature had not seen fit to bring it strictly within the terms of the statute. In other words, that the state was estopped, for the reasons stated, from demanding the payment of a retail license by the club. This reasoning does not appeal to other courts which have reviewed this decision, as I shall hereinafter show. But in all of the decisions favorable to the clubs, I think it safe to say that not one is based upon a statute as plain in terms as that of the laws we are now discussing. Even under the statutes in most of the cases mentioned, the decisions appear to be "strained".

It is also worthy of note that in nearly all of the statutes in which decisions have been rendered in favor of the right of clubs and associations to sell liquors or "dispense" them to members without the payment of a license, the statutes have been subsequently amended bringing such clubs specifically within the terms of the statute and made so plain that no court can misconstrue them.

It would serve no useful purpose to review these decisions in detail. In the few cases which do not turn wholly upon the construction of the statutes the argument is made that the dispensing of liquors to the members of such associations does not constitute a "sale" within the meaning of the license laws. That the liquor is the common property of the members, bought with the common funds of the club, and that the dispensing of the same to the members is only a means of distributing the common property among the owners. In other words, that the individual member

in taking the liquor is only segregating his own property from the common mass, although he pays into the common fund the full value of all he so extracts.

Among the more recent, and which may be called the leading, cases which take this view are:

- Tennessee Club v. Dwyer*, 11 La. 452 (47 Am. R. 298);
State v. Austin Club, 89 Tex. 20 (30 L. R. A. 500);
Piedmont Club v. Com., 87 Va. 540;
State ex rel. Bell v. St. Louis Club, 125 Mo. 308 (26 L. R. A. 573);
Com. v. Pomphret, 137 Mass. 564;
Klein v. Livingston Club, 117 Pa. 224 (34 L. R. A. 94);
People v. Adelphis Club, 149 N. Y. 5 (31 L. R. A. 510);
Cuzner v. California Club, 155 Cal. 303 (20 L. R. A. [N. S.] 1095).

On the other hand, there are many courts that are not impressed with the specious reasoning of the cases cited, and hold as does the Supreme Court of Maryland in *State v. Easton Social Club*, 73 Md. 97 (10 L. R. A. 64)

“that there is no occasion to be astute and to indulge in questionable refinements in order to relieve these corporations of the just consequences of their acts, or to endeavor by artificial or fictitious reasonings to permit persons in combination to do what individuals without combination could not do.”

Among the cases so holding are:

- Army and Navy Club v. District of Columbia*,
 8 Appeals D. C. 544;

- People v. Soule*, 74 Mich. 250 (2 L. R. A. 494);
State v. Easton Social Club, 73 Md. 97 (10 L. R. A. 64);
State v. Mudie, 22 S. D. 41 (115 N. W. 107);
Martin v. State, 59 Ala. 34;
Beauvoir Club v. State, 148 Ala. 643 (42 So. 1040);
Marmont v. State, 48 Ind. 21;
State v. Mercer, 32 Iowa 405;
State v. Lochyear, 95 N. C. 633 (59 Am. Rep. 287);
State v. Horacek, 41 Kansas 87 (21 Pac. 204);
State v. Boston Club, 45 La. Ann. 585 (20 L. R. A. 185);
Mohrman v. State, 105 Ga. 709 (43 L. R. A. 398);
State v. Minn. Club, 106 Minn. 515 (20 L. R. A. [N. S.] 1101);
Spokane v. Banghman, 54 Wash. 315 (103 P. 14);
State v. Kline, 50 Ore. 426;
South Shore Country Club v. People, 228 Ill. 75 (12 L. R. A. [N. S.] 519);
People v. Law and Order Club, 203 Ill. 127 (62 L. R. A. 884);
Manning v. Canyon City, 45 Colo. 571 (101 Pac. 978);
Ada County v. Boise Commercial Club, 118 Pac. 1086);
State v. Neis (N. C.), 12 L. R. A. 412;
In re Cutting (Calif.), 121 Pac. 304, 305, par. 1.

The courts seem to be unanimous in holding that when clubs are organized for the purpose of evading the license laws, or against the provision of the local option laws, and dispense liquors, purchased with the common funds, to the members at a fixed price per

drink or bottle, such a transaction constitutes a "sale" within the meaning of these laws. See cases cited in note to *South Shore Country Club v. People*, 12 L. R. A. [N. S.] 519.

We confess that we are unable to follow the reasonings of those courts that hold that the same transaction constitutes a "sale" or does not constitute a "sale", depending upon the purpose for which the club exists, or whether a license law is being construed, or a local option law which prohibits any *sale* within a prescribed territory; the question being in each case what acts constitute a "sale", not what the purpose and design of the "sale" may be.

The above cited case, *South Shore Country Club v. People*, 12 L. R. A. (N. S.) 519, was very carefully considered by the Supreme Court of Illinois. The defendant club was a corporation, not for pecuniary profit, but for the pleasure and social recreation of its members—one of the usual high class clubs found in the cities. The sale of the liquors to its members was purely incidental to the objects and purposes of the club, the same as the furnishing of meals, etc., but the members were charged for liquors the same as for meals "and for the service of caddies, boatmen and teachers and for horses, golf supplies, and special services". The club held a United States retail liquor dealer's license, but the plea averred that it was secured "inadvisedly and was not necessary".

The Court, speaking through Mr. Justice Cartwright, says:

“The right to engage in the business of selling intoxicating liquors by retail is not now a common right, and can be exercised only in the manner and upon the terms which the statute prescribes. *People ex rel. Morrison v. Greiger*, 138 Ill. 401, 28 N. E. 812. The statute provides for licensing such sales, and makes a sale without a license a criminal offense. It provides that whoever, not having a license to keep a dramshop, shall sell any intoxicating liquor in any less quantity than one gallon, or in any quantity, to be drunk upon the premises, shall be punished by fine, or imprisonment, or both; and, if appellant has been guilty of a misuse of its corporate power by making sales of liquor to be drunk upon its premises, the judgment of the superior court must be affirmed. The only question to be determined is whether the furnishing and delivery of intoxicating liquors by appellant to its own members, to be drunk upon the premises, and which are paid for by the individual members to whom the same are furnished and delivered, constitute a sale. Counsel for appellant admits that the letter of the statute requires any and every one, without exception, who sells intoxicating liquors in any less quantity than one gallon, or in any quantity, to be drunk upon the premises, to take out a license to do so; and he fully appreciates that the definition of a dramshop adopted by the legislature is broad enough to include any place where intoxicating liquors are retailed in less quantity than one gallon; but he says that appellant contests the right to demand a license because it refuses to have its clubhouse considered a dramshop, or to be regarded as a dramshop keeper. The argument is that the court should not take the language of the statute literally, and that the general intent and spirit of the act do not require that it should be so taken. A dramshop, as defined by the statute, is a place where spiritous, or vinous, or malt liquors are retailed by less quan-

tity than one gallon; and it is true that the term has, in popular acceptation, a more restricted meaning. It is commonly used to designate a place where intoxicating liquor is sold at a public bar frequented by the public without restriction, and, if the legislature had failed to define what was intended by the term 'dramshop', it would be reasonable to presume that it was used in the ordinary and popular sense; but, of course, the legislature had a right to define what was meant by the term as used in the act, and the courts are bound by the definition. The argument of the appellant is the same as that of the druggist, Wright, who felt himself aggrieved that his drug store should be brought within the definition of a dramshop by the sale in good faith of liquor for purely medical purposes. His chief business was the sale of drugs and medicines, and he did not even sell intoxicating liquor as a beverage, as the appellant does. The court put in the background the popular idea of the dramshop, saying that undue importance was given to that term, and enforced the law to its literal meaning. The court said: 'The only safe course is to enforce the law as the legislature has made it, and not defeat its execution upon some hypothetical theory of public policy that finds no place or recognition in the act itself.' *Wright v. People*, 101 Ill. 126. Appellants clubhouse would not be no more or less a dramshop with the license than without it, and, if the facts bring it within the definition adopted by the legislature, it must be held to be a dramshop, whether the definition accords with the popular understanding or not."

The Court then takes up two of the cases above cited, holding to the contrary, to wit: *Klein v. Livingston Club*, 177 Pa. 224, and *State v. St. Louis Club*, 125 Mo. 308, and, after stating what was considered and decided in these cases, says:

"It is undoubtedly equitable, as said in the Pennsylvania case, that the members of a club who drink the liquor should pay for it, and that those who do not touch it should not pay anything; but we do not see how it can be said that the transaction is merely an equitable distribution between the members of property belonging to them in equal shares. The liquor belongs to the corporation as a legal entity, and no member owns any share of the liquor, as a tenant in common with the other members or otherwise. An association organized merely for social, literary, scientific, or political purposes, although not incorporated, is not a partnership. 25 Am. & Eng. Enc. Law, 2d ed., p. 1137. A member of such association has no individual right or interest in the property, and owns no proportionate share of it, but only has a right to the joint use so long as he continues to be a member. Even if they were tenants in common, a transfer of a specific part of the property to one for a stipulated price would be a sale. Appellant, however, is incorporated, and its stockholders are not tenants in common of its property; but the title is in the corporation. The right of a stockholder is to participate, according to the amount of his stock, in the profits, and, upon the dissolution of the corporation, to share in the assets remaining after the payment of the debts. If a member should clandestinely enter the clubhouse and withdraw from what is called the 'common property', as much of the liquor as would be represented by his interest as a member, it would hardly be considered that the act would not be larceny. The arguments presented to show that the dispensing of liquors for fixed prices paid by the members is not a sale, if applied to the case supposed or any other conceivable transaction, would certainly be unique. We agree with the views expressed in *State v. Easton Social, Literary & Musical*

Club, 73 Md. 97, 10 L. R. A. 64. 20 Atl. 783, that there is no occasion to be astute, and indulge in questionable refinements, in order to relieve these corporations of the just consequences of their acts, or to endeavor by artificial or fictitious reasonings to permit these persons in combination to do what individuals without combination could not do.

"The fact that there is not profit in a sale does not deprive the transaction of its character as a sale, and surely it makes no difference that the sale of the liquor is only incidental to the main purpose of the club. *Mohrman v. State*, 105 Ga. 709, 43 L. R. A. 398, 70 Am. St. Rep. 74, 32 S. E. 143. The sale of liquor is but an incident to the business of a drugstore or restaurant. It is certainly but a trifling incident to the business of a large hotel. The business is carried on in department stores, where it is but a minor and incidental branch of the whole business. *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707. It is immaterial whether the main purpose of a corporation is social pleasure or making money by the sale of merchandise, if intoxicating liquor is sold at retail as an incident of the main purpose or otherwise; and neither is the fact that the public generally are not admitted.

"We are convinced that the former decision of the question here involved was correct, and the judgment of the Superior Court is affirmed."

In *Martin v. State*, 59 Ala. 34, and *State v. Neis*, 108 N. C. 787 (12 L. R. A. 412), it was held that the employee of a social club, who, without a license, dispenses intoxicating liquors, was guilty of selling without a license, although the liquor had been purchased with the funds of the club, and was sold only to the members of the club, and the money received therefor

was deposited in a common fund, and was spent only to replenish the stock of liquors for the use of the club.

And the club itself, upon such a state of facts, was held liable to the penalty for selling liquors by retail without a license, in *State v. Essex Club*, 53 N. J. L. 99 (20 Atl. 769).

In *Mohrman v. State*, 105 Ga. 709 (43 L. R. A. 398) it was held that the mere fact that the selling and drinking of intoxicating liquors was only an incident, and not the main object, of the incorporation of a social club, would make the place where such liquors were dispensed to and drunk by members only, none the less a tippling house, within the meaning of the statute making penal the keeping open of such a house on the Sabbath day.

In *People v. Soule*, 74 Mich. 250, it was held that a club properly organized in good faith could not purchase liquors by the quantity and distribute them among its members receiving pay therefor as they were distributed by the glass, the proceeds to go into the treasury of the club to be used in purchasing other liquors, or in paying expenses, without being able to pay a retail tax for selling such liquors; it being clear that the statute regulating the sale of intoxicating liquors *was not aimed at saloons or public bars alone*, because it expressly provided that retail dealers "shall be held and deemed to include all persons who sell any of such liquors by the drink", and further provided that "all saloons, restaurants, bars in taverns or elsewhere, and all other places, except drug stores,

where any of the liquors mentioned in this Act are sold or kept for sale either at wholesale, or retail, shall be closed on the first day of the week”.

Another well considered recent case is that of *Manning v. Canyon City*, 101 Pac. 978 (Supreme Court of Colorado). The defendants constitute a board of control of the Elks club of Canyon City. They were found guilty in the lower court of the violation of an ordinance reading as follows:

“Whosoever by himself or another either as principal, clerk, agent, or servant, shall sell or dispose of, or shall give away for the purpose of avoiding any of the provisions of this ordinance, any intoxicating, spirituous, malt, vinous, fermented or mixed liquors within the corporate limits of this city, or within one mile beyond the outer boundaries thereof, shall be fined not less than one hundred (\$100) dollars, nor more than three hundred (\$300) dollars for each offense; provided that this ordinance shall not apply to regularly licensed druggists, who may have a permit from the city council to sell such liquors, when sold in accordance with said permit.”

In the opinion Mr. Chief Justice Steele, speaking for the Court, says:

“The club is a part of and under the control of the Canyon City Lodge of the Benevolent Protective Order of Elks of the United States of America. The membership of the order is in excess of a quarter of a million of persons, and it, through the subordinate lodges maintain clubs in many of the towns and cities of the country, and there are clubs of the order maintained in most of the important cities and towns of this state. This club is a *bona fide* club, and, as found by the

court below, is composed of about four hundred substantial and respectable citizens of Canyon City. It is maintained for the entertainment, pleasure and benefit of the members of the order, and any member of the order, whether a resident of Canyon City or elsewhere, is entitled to the privileges of the club. The club is supplied with newspapers, magazines, and such reading matter as the management may deem advantageous or desirable for the members. It maintains billiard, pool, and card tables. Food and liquors are dispensed to such of the members as may desire them. In short, it is a social club, like any other social club to be found in the large towns and cities of the country; the dispensing of liquors being a mere incident to, and not the object of, the organization. It is an unincorporated association. No visitor or guest of a member is permitted to spend money in the club, but the member introducing the visitor or guest is responsible for his guest's entertainment. The club keeps on hand a supply of the various kinds of intoxicating liquors, which it dispenses to its members and guests, and the members of the order at the rate fixed by the board of control. Those to whom liquors are supplied may pay cash or have the amount charged. The amount received from the members for the liquor goes to replenishing the supply of liquors and defraying the expenses of the club."

* * * * *

"It is contended by counsel for the defendants that the process by which the members of the club obtain the title to a quantity of liquor, to be disposed of by the individual as he may desire, is not a "sale", but a mere distribution of the liquor of the club among its members. On the other hand, it is contended by the city that such process is a sale and is within the prohibition of the ordinance, and upon a determination of these propo-

sitions the whole controversy depends. If such disposing of liquors constitutes a sale, then the defendants were legally convicted, and the judgment should stand; otherwise the judgments should be reversed and the defendants discharged."

"The decisions are in irreconcilable conflict. In the decisions where courts hold that clubs are exempted from the license laws, it is generally because of some peculiar word or phrase contained in the statute, and it should be noted that no case is presented where a prohibition statute has been construed as exempting social clubs from its operations. In the case of *State v. Kline*, 50 Ore. 426, 93 Pac. 237, decided in 1907, and the latest case we have seen on the subject, Mr. Justice Moore, in the course of the opinion said: 'In the note to the case of *Barden v. Montana Club*, 24 Am. St. Rep. 27, immediately following the excerpt hereinbefore quoted, the editors of that valuable series of case laws makes the following observation as deducible from an examination of adjudications applicable to the inquiry, to wit: "The question whether or not the furnishing of intoxicating or fermented liquor by a club to its members in the manner above stated constitutes a sale in violation of laws prohibiting sales or whether or not it constitutes a sale within the meaning of a law requiring a license before one can engage in retailing such liquor, has been the subject of various and conflicting decisions by a number of the appellate courts of the country. While the cases can not be reconciled, the current as well as the weight of authority is undoubtedly in favor of the rule that the distribution and consumption of liquors in a club by its members in the manner above stated is a sale and a violation of the laws of the nature stated.' Several cases are cited and quotations therefrom are contained in the notes that fully sustain the conclusions thus

reached, and we adopt that part of such deduction as relates to the disposal of intoxicating liquor by a club to its members in violation of the provisions of a local option law, without further calling attention to the cases relied on."

The court then discussed a number of opinions hereinbefore cited, and continues:

"Supporting the doctrine announced in the foregoing decisions are the decisions of the Supreme Court of Alabama, Kansas, Kentucky, North Carolina, Mississippi, Indiana, Michigan, Georgia, West Virginia and Louisiana; and whenever the question has been presented to a federal court, that court has held the clubs liable as retailers to pay the government tax. Not only is the greater weight of authority, but, in our opinion, the better reason, on the side of those courts that hold the transaction between the club and its members, such as we have described herein, to be an ordinary sale." (Citing cases.)

"There are many authorities supporting the view that the transaction by which a member of a club acquires a quantity of liquor for its own use upon the payment of a stipulated price is not a sale. It is so held in Missouri, by the Supreme Court, in *State v. St. Louis Club*, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573; but Judge Philips, then District Judge for the Western District of Missouri, held in the case of *United States v. Giller* (C. C.), 54 Fed. 656, that social clubs where liquor was dispensed were retail dealers and were required to pay the government tax, and in a case decided by the St. Louis Court of Appeals (*State v. Bacon Club*, 44 Mo. App. 86) it was held that such a transaction is a sale within the prohibition of the statute of the state. The opinion closed with this significant sentence: 'The principle of law that prohibits a laboring man

from buying a drink of liquor in a saloon ought to prevent wealthy gentlemen from organizing themselves into corporations for the purpose of selling it to their members.'

"In Massachusetts the Supreme Court held that the distribution of liquor to the members of a club, by a transaction similar to the one before us, is not a sale. *Com'rs v. Smith*, 102 Mass. 144. But the Federal court of Massachusetts held that such transactions were sales, and the clubs were liable for the violation of the federal laws as retail dealers. *United States v. Wittig*, 28 Fed. Cas. 744."

"The Pennsylvania Supreme Court holds, in *Klein v. Livingston*, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717, that, where an incorporated social club is organized and conducted in good faith, owning its property in common, to which the furnishing of liquor to its members is merely incidental to the purpose for which it was organized, the furnishing of liquors does not constitute a sale; but the federal courts of Pennsylvania hold that such dealing with members of clubs does constitute a sale, and requires the clubs to pay the government tax as retail liquor dealers. *United States v. Alexis Club* (D. C.), 98 Fed. 725. The facts in the Federal case were about as they are here, and Judge McPherson in his opinion says, among other things: 'Did the defendant, then, sell liquor to its members? I shall not review the irreconcilable cases upon this subject, nor make the superfluous attempt to produce a new argument in support of my conclusion. I content myself with saying briefly, that I agree with the general opinion of the community, and hold the transaction to be a simple, ordinary sale. If a chartered club, such as the defendant, buys liquor, the legal title to this property is in the corporation, and not in the members. * * * The legal title then being

in the corporation, it is further to be observed that, when the title passes to a consumer, it passes by a transaction that exhibits every element of a sale, and shows no outward sign of being anything else. The intending consumer asks to be served with a definite quantity of intoxicating drink. The owner of the legal title of the liquor, acting by a paid servant, agrees to the request, requires the price to be paid in cash, or accepts the consumer's promise to pay in the future, and thereupon delivers the subject of the bargain. Nothing else takes place, and, if this is not a sale, but is really a partial distribution of the common stock, the truth is so veiled that the participants in the transaction, I venture to assert, rarely suspect that they are taking part in anything but a commonplace sale. It is safe to say that—except, perhaps, among those lawyers that may be familiar with the discussion upon the subject—to order and receive liquor at a club is always regarded as a sale, and I see no sufficient reason for declining to accept the popular estimate of an act so generally known and so easily comprehended.

* * * I may, perhaps, be permitted to add a single word in conclusion. If the result that I have reached is correct I believe it to be in the line of enforcing equality before the law; and equality before the law is a principle of American society than which there is none more vital. Privilege and privileged classes are, and ought to be, intolerable; and it comes irritatingly near to a privilege when social clubs, offering advantages of comfort and luxury that are only within the reach of the more prosperous, escape a share of the public burdens, because a refined reasoning declares that they are doing no more than distributing a common stock of liquor among their members, while the robust sense of the community, not excluding the club members themselves, knew the transaction to be a sale.' "

"There are other authorities which sustain counsel in their contention that the transaction of the club in dispensing liquor is not a sale, but we are able to distinguish the act of the club in dispersing of its liquors to its members and any other process by which the title to intoxicating liquors is passed from one person to another by delivery and payment. In many of the cases cited the liquor disposed of in the clubs was the property of a corporation, and the courts held that, as the legal title to the liquor was in the corporation, and not in the individual members, the transfer by the corporation to the members constituted a sale, and the council attempts to distinguish between the case at bar and those cases."

"When one becomes a member of the Elk's Club he places his interest in the club property in the hands of a board of control, and he has a joint interest in the club property so long as he remains a member, subject to the right of the board of control to dispose of it as provided by the by-laws. The testimony shows that the Elk's Club, through its board of control, or a servant thereof, delivers to the members on demand such quantity of liquor as he may desire, for such price as has been fixed by the board, to be paid for in cash or to be charged to the member's account. The liquor thus delivered may be consumed by the member, or may be given away, or may be destroyed. The money that is received is used to replenish the treasury of the club and in buying other liquors or supplies. The member, assuming that he has an interest in it, has but a minute interest, and when he exchanges his money for a quantity of liquor, he pays for his minute interest and the interest of each of the other members. But it is doubtful if he has any interest which he may take by this method of distribution."

"By becoming a member of a society or club

a person acquires, not a severable right to any of its property, but merely a right to its joint use and enjoyment so long as he continues to be a member, which right ceases upon his withdrawal or expulsion from the society. The right of membership invests him with no individual transmissible interest in the property and effects of the association, and neither he nor any member less than the whole can dispose of such property, or any supposed proportionate part or interest therein.' " Am. & Eng. Ency. of Law (2d Ed.), Vol. 25, p. 1135.

"But when the members of a club clothe the board of control with the authority to dispose of liquor belonging to the club, they relinquish their right to have the entire property of the club remain intact for joint use, occupancy and enjoyment of all the members, and make such board their agent to dispose of the liquor, and, in our opinion, such disposal by the board is a sale pure and simple. The transaction appears to contain all the elements of a sale. Such transaction is but a contract between the parties to give and to pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing bought and sold; and it would require, to paraphrase the remarks of Judge McPherson, a refined reasoning to declare that the club is doing no more than distributing a common stock of liquor among its members, while the robust sense of the community, not excluding the members themselves, know the transaction to be a sale."

"Under the by-laws of the club, any of the several hundred thousand members of the order of Elks in the United States, is entitled to all the privileges of the club, and it is not seriously contended that under a by-law such as this the delivery of liquor for pay does not constitute a sale; but we have determined not to base our judgment upon such fact alone. Owing to the great number

of social clubs in the state whose status concerning the disposition of intoxicating liquor should be determined, we have concluded to rest our opinion on the broader ground and settle the controversy."

One of the latest cases which we have been able to find on this subject is *Ada County v. Boise Commercial Club*, decided by the Supreme Court of Idaho, November 1, 1911, and reported in 118 Pac. at page 1086 *et seq.* This was an action by the county of Ada against the Boise Commercial Club to collect a license for the sale of liquors. The case was submitted on an agreed statement of facts. The defendant was a corporation organized under the laws relating to religious, social and benevolent corporations, had no capital stock and was not conducted for pecuniary profits. The main purpose of the club was the same as that of other commercial clubs—to advance the commercial interest of the city and state. In the opinion the Court says:

"This appeal involves the construction and application of section 1506, Rev. Codes. This section reads as follows: 'It shall be unlawful for any person, by himself, by agent or otherwise, to sell spirituous, malt or fermented liquors or wines, to be drunk in, or about the premises where sold without having first procured a license and given a bond. * * *' This section became the law of this state on the first day of July, 1891. Council for appellant makes two different contentions against the application of this statute to the facts of this case: First, that it was not the intention of the Legislature to make the word 'person' as used in section 1506, include

clubs of the kind and character described in the agreed statement of facts. We think the statutes of this state answer this objection."

(1) "Section 15 of the Revised Codes provides: 'Words and phrases are construed according to the content and the approved usage of the language, but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition.'"

(2) "Section 16, Rev. Codes, among other things, provides: 'The word person includes a corporation as well as a natural person.' This latter section of the statute became a law while Idaho was still a territory, and has been continued as a part of the laws of Idaho since its statehood, and the definition of the word 'person' has never been changed or altered or questioned by the Legislature in any subsequent legislation, and the definition given in the statute has been accepted as the true and correct definition, and such has been the usage of the term 'person' since the adoption of such statute; and in construing the same we are admonished by section 15, *supra*, that words and phrases are construed according to the context and the approved usage of the language, and we think that the accepted usage of the term 'person' has been and is that it includes a corporation as well as a natural person."

(3) "It is, however, urged by counsel for appellant that, inasmuch as the Legislature fails to include the term 'incorporated club' in the provision of section 1506, therefore the Legislature did not intend to include such club within the provision of said section. It was unnecessary to classify the kinds or character of corporations which would be required to secure a license to sell intoxicating liquors to be drunk on the prem-

ises, unless the Legislature had in mind the exclusion of a particular kind or character of corporation from the operation of the statute, because it had been previously enacted and had long been a law when section 1506 was enacted and the word 'person' included all corporations, and we think the conclusion is inevitable that, if the Legislature intended to exclude any particular kind of corporation, they would have so declared in the section. Therefore, when the Legislature said 'any person' they intended that the word should mean the same as defined by the Code, and should include corporations, and, if so, if clubs are corporations, the word 'person' includes such corporations."

The court further says:

"The second question urged upon this appeal is: Are the transactions with reference to the distribution of intoxicating liquors as set out in the agreed statement of facts sales? It must be conceded at the inception of a discussion of this question that the courts are very much divided. This conflict of views has arisen out of two different causes, the first the language used in the statutes of the various states requiring a license; the second, an apparent notion that there are good clubs and bad clubs, and that the clubs which are good are not exclusively engaged in the business of selling intoxicating liquors are, or ought to be, exempt from the statute requiring a license, while all other clubs must procure a license. Under the facts in this case the Boise Commercial Club is a corporation organized as a club and it is agreed: 'That ever since the organization of this club it has maintained in connection with its buffet a stock of vinous, spirituous and malt liquors and cigars in quantities sufficient to fulfill the wants of its members and their guests. That these liquors and cigars are purchased by

the club at wholesale prices and supplied to members and their guests exclusively, without pecuniary profit to the club, in small quantities or individual drinks, to be consumed by such member and guests within the clubrooms. That the amount paid by such member for such drink is in excess of its original cost to the club, but the amount of this charge is regulated to cover the actual cost to the club of the liquor and cigars and expense of serving the same and conducting the buffet. On being served the member signs a card which is thereafter filed by the servant of the club in the office of the secretary, and is paid by the member before leaving the clubroom or charged to his account.' While it is true the furnishing of such liquors is merely incidental to the main objects and purposes of the club, still that fact in no way lessens the transaction. The club purchases and keeps in stock the liquors, and furnishes the same to the members and their guests, and a charge is made therefor in excess of the cost of such liquor to the club. It thus appears from this statement that the liquors are the property of the club."

(Citing cases.)

"The club being a corporation, under our statutes the stockholders and members thereof bear the same relation to the club as stockholders in any regular corporation organized under the statute, and the property purchased by the club and dispensed to its members is a disposition on the part of the club, to the members, of such property, and the members secure the possession of the liquor by paying the club a certain price. An examination of this statute discloses the fact that the 'person' making the sale is not limited to a person engaged in the business of selling liquor, or a person engaged in conducting a saloon or a disorderly place of business, or that the selling of liquor shall be the principal business conduct-

ed, and not a mere incident to aid the principal business, but does require that all persons who sell, whether the sale be an incident of the principal business, or be made at a profit or a loss, shall procure a license before the sale is made."

"Had the legislature intended to make any exception of the extent of the sale or the place where or the manner of the sale, or the place where the liquor is sold, or whether the sale was at a profit, or whether it was made simply to aid a general business carried on, it no doubt would have made some provision in the statute for such exception. The fact that the sales made by the club are merely incidents of the general purpose and objects of the club, and are not made for profit, does not relieve the club from the obligations of the statute, because if they were true, then there is no reason why a grocery store, or a drygoods store, or a blacksmith shop might not keep a stock of liquor on hand and sell the same as a mere incident to the business carried on by such person, and as a means of inducement to persons to patronize the particular place. So might the entire populace organize itself into various corporations or organizations or clubs for the purpose of carrying on or promoting some particular business or enterprise, and, as an incident to the main business, keep a stock of intoxicating liquors on hand and furnish the same to the members or patrons, even at a loss, and thereby increase their patronage so that the increase in trade would be the profit, and thus the statute be entirely evaded. It is no doubt true that when the Commercial Club it attached as a part of the business of the club the sale and disposition of intoxicating liquors as an inducement to persons to become members of the club in order that they might have the accommodations furnished at the bar of the club, and the club may have benefited and profited by the fact that its membership was in-

creased by reason of this special inducement, although the direct profits of the sale of the liquor was a matter of little consequence and of little profit. Section 1506 of the statute, however, makes no such exception, and there is no other provision of the statute which seems to make any such exception."

"But it is contended that there was no sale made by the club of intoxicating liquors. The stipulation of fact says that the club purchased intoxicating liquor and supplied it to members and their guests, and that the amount paid by the members for such drinks was in excess of the original cost to the club. Was this a sale within the meaning of the statute? There is no definition given by the statute of the word 'sale' as used generally throughout the Code, but we are admonished by the provisions of section 15 of the Code that 'words' and phrases are construed according to the context and the approved usage of the language, and the word 'sale' as used in said section is a word that has been well defined in its meaning by the courts and text writers, and is also a word of approved usage. As generally used 'sale' means the transfer of title by valid agreement from one party to another for some consideration." 1 Mechem on Sales, Sec. 1; 1 Benjamin on Sales, p. 1; Black's Law Dictionary, p. 1053.

"In the case of *State v. Kline*, 50 Ore. 426, 93 Pac. 241, in defining the word 'sale' used in a statute which prohibited any person within the prescribed bounds of a prohibition district to sell any intoxicating liquors whatsoever, and that such person should be subject to prosecution, the court says: 'It would seem from an inspection of the language last quoted, that the section was framed with an intent to prevent the disposal of intoxicating liquors by a non incorporated social club to its members within prohibition territory, even

if it were determined that the transfer of the special property in the liquor by an agent of the organization to a member thereof constituted only a gift. Where, however, as is assumed in the case at bar intoxicating liquors are purchased by an incorporated society, to be used as is hereinbefore detailed, it would appear that the corporation is the owner of the liquors, and, when they are dispensed to a member with the intent to pass the title in the goods, the act constitutes a 'sale'. In that case the Court had under consideration the liability of an agent of a corporation organized for the same general purpose as the appellant in this case."

The court then discussed the Colorado case above cited and the opinion of Judge McPherson, in *United States v. Alexis Club*, 98 Fed. 725, and says:

"We think this statement of the Federal Court is correct and clear, and that little can be added to what is there said. We think, however, we might supplement the language of that court by saying that we do not believe that the opinion is generally entertained by members of any social club incorporated under the laws of a state, which sells intoxicating liquors, and a charge is made therefor, that the transaction is anything else than a sale. The member makes the purchase in the same manner and pays the same price for the article purchased as he would at the common bar of a saloon, and the transaction is carried on in the same manner as a transaction involving the purchase of a pound of sugar or a can of coffee in a grocery store. He never considers or recognizes that the article purchased is his property, but does recognize that the property is the property of the club, and that he is paying for a distribution of property belonging to himself, but does recognize that the property is the property

of the club, and that he is paying for the same in the same manner as he would pay for any article purchased of a mercantile company engaged in that line of business. In the case of *City of Spokane v. Baughman*, 54 Wash. 315, 103 Pac. 14, the Supreme Court of the state of Washington had under discussion the question of the sale of intoxicating liquor at the Spokane Club, organized for the same general purpose and having the same objects as the appellant club, and says: 'Among other accommodations furnished by the Spokane Club for the use of its members and their guests * * * it has maintained a room in the club quarters, with one of the regular club employees in charge, where cigars, liquors, wines, beers, and mineral waters are furnished, at charges from time to time fixed by the board of managers of the club. No money is received by the attendant for the goods so furnished, but slips are signed by the members, showing the character of the goods furnished and the cost thereof. These slips are turned in by the attendant to the bookkeeper of the club, and are charged to the account of the member, and in due course are paid by him.' The language of the ordinance which was alleged to have been violated provides: 'If any person shall, within the limit of the City of Spokane Falls, sell, dispose of', etc. And the Court says: 'When the liquor is bought through the regularly constituted agent of the corporation, it undoubtedly belongs to the corporation, the title as well as the possession, being in the corporation, and it remains there until it is transferred to the buyer for a consideration. Then it becomes the property of the purchaser, and it is at his absolute disposal. He can drink it himself, give it to his guest, or throw it away. The corporation has no further interest in it. In other words, it has been paid for, and the transaction, it seems to us, involves all the elements of a sale.'

After discussing a number of the cases above cited the court adds:

“While there are many other authorities supporting the rule announced in the cases cited and considered above, yet we deem it unnecessary to go into a further discussion of those cases. We think the weight of authority is with the proposition that where a statute in positive terms prohibits the sale of intoxicating liquors to be drunk upon the premises where sold, without first procuring a license, and no exceptions are made excluding clubs organized as corporations, and such corporations are persons under the statute, then all sales made by a person or corporation of whatsoever character, where no license has been procured, come within the provisions of Rev. Codes, Section 1506.”

In discussing a California case which gave weight to the fact that the statute or ordinance under which the prosecution was conducted did not specifically name social clubs, the court says:

“The objection is very easily answered by saying that if the city of Los Angeles, or any other city, was intended to be excluded from the operation of an ordinance or statute which absolutely prohibits the sale of intoxicating liquors without a license, it is a very simple matter for the city or Legislature to so provide by language that clearly shows such an intent. We can not agree with the California court or the cases which follows its reasoning. To our mind these cases announcing such a rule have attempted to lay down principles which would shield and protect certain classes selling intoxicating liquors in violation of a statute.”

The court then discussed in detail the cases, holding that such transactions do not constitute sales, explaining or criticising the same, and continues:

“Section 1506, does not require a license only from those engaged in the business or occupation of selling liquors, but it is made unlawful for any person to sell, whether such person be engaged in the business of selling or not. The person making the sale is not required to be engaged in that particular business. If it is a sale, then a license must be procured under the provisions of the statute, and the Texas case holds such is a sale if it be in a territory where the sale is prohibited. In this state the sale is prohibited where a license is not obtained, and a sale without license is in territory where a sale is prohibited without the same.

“Many other cases are cited by counsel for appellant which hold that a club organized for social purposes, such as the Boise Commercial Club, where intoxicating liquors are purchased by the club and dispensed to members, and such disposition of the intoxicating liquors is merely incident to the main objects and purposes of the club, is not subject to revenue license laws, and although the statute makes no mention of the club as being exempt from the provision of the revenue laws, yet the courts will say that sales made by such clubs are merely a distribution of the property of the club to the members to whom it rightly belongs, and that, therefore, there is no sale. We can not agree with this line of decisions. In our judgment every single opinion which holds as above indicated, partakes of a disposition and effort on the part of the court to shield the clubs and remove them from the operation of the statutes solely because they are social in character, and composed of men who are inclined to promote commercial interests and

business opportunities and social gatherings. To our mind that theory of the application of the law results in a class distinction which is unreasonable and dangerous, and not justified by legislative enactments or common-sense application.”

“It is also argued on behalf of the appellant that the appellant club has not been called upon to procure a license under the provisions of Section 1506 of the Revised Codes since the organization, until a short time before the stipulation of facts was entered into, and that the appellant club was never required by the county or its officials, nor by any state official to take out a license under said section, and that such demand has never been made upon any *bona fide* social club or corporation throughout the state—although such clubs and corporations have been in existence and in operation in Ada county and other parts of the state for more than fifteen years, and had furnished and supplied intoxicating liquors in the manner adopted by the appellant club; and because of this policy in carrying out the laws of the state it is claimed that the legislative intent in enacting section 1506 is shown, and that such clubs were not intended to be within the provisions of said section. After section 1506 was enacted, as a law of the state, and in plain, clear and positive language prohibited the sale of intoxicating liquors to be drunk on the premises where sold without a license, it was the duty of the proper officer in each county to enforce the law, and collect the revenue provided for in the statute from all persons making sales of liquors in violation of the law, and the mere fact that such officers have failed to perform their duty will not control this court in giving effect to the plain language of the statute. It is an elementary principle that the neglect or failure of public officers to do and perform their duties as required by law will not estop the public

or prevent any rights or acts of the state in enforcing such laws, and we are not inclined to announce as a legal proposition that the failure of the public officials to collect a revenue license where such is required for a number of years will be evidence of the intent of the legislative body in passing such law to exclude from the operation of such statute persons and corporations from whom such officers have failed to collect such revenue license."

"We have most carefully gone through and examined the cases cited by both sides in this case, and are thoroughly convinced that under the provisions of section 1506 the question is not in doubt; that the section was intended by the Legislature to prohibit all persons of every kind, nature and description, including corporations of all kinds and natures, from selling intoxicating liquors to be drunk on the premises without first procuring a license and that good reasoning and common sense makes such a statute applicable and operative as against a corporation, although the sale of intoxicating liquors is a mere incident of the general objects and purposes of the club." See note to this case in 38 L. R. A. (N. S.) 101.

In our view the decided weight of authority and the better reasoning, as shown by the cases above cited and reviewed, are that such transactions as we are discussing, notwithstanding some of the text books to the contrary, constitute SALES of intoxicating liquors within the meaning of the license laws, many of the statutes construed being not nearly so plain and unambiguous as our own statute.

The decisions of the Federal courts construing the internal revenue laws should be a determining factor in this case. These courts, without exception so far

as we are advised, hold that such transactions as we are considering in this case constitute the club or persons so dispensing liquors *retail liquor* dealers within the meaning of those laws and subject to the license tax therein prescribed. These courts brush aside with scant courtesy the subterfuges and specious pleas that such transactions do not constitute sales. See

U. S. v. Wittig, 28 Fed. Cases 744;
U. S. v. Giller, 54 Fed. 656;
U. S. v. Alexis Club, 98 Fed. 725;
U. S. v. Woods, Fed. Cases No. 16759;
U. S. v. Roliger, Fed. Cases No. 16190.

It should be noted that the first three cases cited are from courts sitting in states in which the state courts have held such clubs and associations not subject to the license laws of the state, that of Judge Lovell in *U. S. v. Wittig*, sitting in the District Court of Massachusetts, that of Judge Philips, sitting in the Western District of Missouri, in *U. S. v. Giller*, and that of Judge McPherson, sitting in the Eastern District of Pennsylvania in the case of the *U. S. v. Alexis Club*.

In *U. S. v. Rolliger*, *supra*, a number of persons united themselves together into a voluntary association for the purpose of providing themselves with whiskey and beer as they wanted it, charging a membership fee out of which the first stock of liquors were purchased. This liquor was furnished to members at a price fixed by a committee and the funds arising therefrom were used in replenishing the stock of liquors and in the payment of expenses. No profits were made.

"The Court (Treat, District Judge) instructed the jury that under the facts, as stated, each member of the association was liable for carrying on business as retail liquor dealer without paying the special tax, and the fact that the business was being carried on without any attempt to make a profit out of it made no difference, and as the law requires those who sell or offer for sale malt or spirituous liquors, shall pay the special tax, without reference to whether the selling or offering for sale is done for the sake of profit or not; and the fact that none but members of the association were allowed to partake of the liquor made no difference. The association was a partnership, in which all the members seem to have been equal partners, and liquors, when purchased in bulk, belonged to the partnership; but when the individual partner went to the clerk of the concern, and obtained from him a drink of the partnership liquor, and paid the clerk for that drink at the price fixed, that was a purchase of so much liquor from the partnership, and it was a sale of so much liquor by the partnership to this individual partner, and for so carrying on business the partnership should have paid a special tax as retail liquor dealers, and having failed and refused to do so, each member of the partnership became liable to the criminal provision of the law."

In *United States v. Wittig, supra*, the essential facts are identical with the case at bar. The court says:

"There seems to be no doubt that the club sells beer to its members. Every element of a sale is present; the delivery of the beer on the one part, and the payment on the other. It was argued that at common law a man can not buy of himself and others. This is a mistake. The common law recognizes such a sale, though, if the con-

tract is executory, the common law has no mode of enforcing it." * * *

"If I am right in saying that the beer is sold by the club to its members, the club is within section 18 (Sec. 3244 R. S.) above referred to, and the question is whether the generality of these words is to be restricted by a consideration of the subject matter, or by the words of Section 16 (3242 R. S.) which speaks of the same persons as dealers and as 'those who shall carry on the business', etc." If the question were merely whether the club carries on the business of beer selling there would seem to be great doubt; but Section 18 appears to be intended to define such dealers with as much exactness as may be, and, if so, the ordinary definition of dealers, or persons carrying on a business is of no importance."

"This is a revenue law, and the decisions of the Supreme Court require us to construe it liberally in favor of the revenue, to prevent evasions. So construed, I think, I think it must be held that any course of selling, though to a restricted class of persons and without a view to profit, is within its meaning."

Applying the same reasoning to section 2577 of the Compiled Laws of Alaska, we may say that said section having defined a *barroom* and required a license therefor, the ordinary definition of barroom or of persons engaged in the business of selling liquor at retail is of no importance. The statute settles that matter beyond cavil.

These decisions are, we think, controlling in this jurisdiction in the construction of said license statute.

Again, counsel for appellants argued in the court below that the said Alaskan statute in reference to licensing the sale of intoxicating liquors applied to

those only who *engaged in the business* of selling intoxicating liquors in a commercial sense, the purpose being to argue their case into a position within the reasoning of the decisions holding that statutes so providing do not apply to social clubs. The weakness of counsels' argument lies in the fact that the Alaskan statute does not admit of such a construction. Said section 2571 does not say that "no person, corporation, or company shall *engage in the business of selling*", etc., but, on the contrary, it says "no person, corporation or company shall *sell*", etc. *One* sale is an infraction of said statute, and the statute is indifferent as to the purpose of the sale. It may be for pleasure, convenience or sociability. So long as it is a *sale*, under the usual definition of that word, it is prohibited by the statute.

Section 2577 of the Alaska statute makes every place where intoxicating liquor is sold in quantities less than five gallons, to be drunk on the premises, a "*barroom*" and the license therefor a *barroom* license, and prescribes that every barroom, or other place where intoxicating liquors are sold at retail, must have a *retail* or *barroom license*. The only requirement of this language is that the amount sold shall be less than five gallons and that it shall be drunk on the premises, in other words a sale *at retail*; nothing is required as to the nature or purpose of the sale; there is no expressed or implied limitation of such a sale to sales made pursuant to "*engaging in the business of selling*" or to sales made by "*dealers*" in intoxicating liquors; neither is there anything to in-

dicates that Congress intended to restrict the sale or sales of intoxicating liquors to any *one* class of sales, but on the contrary the "sale" is left unlimited in its scope, applying to and comprehending sales of every class and description usually comprehended by that term.

The language of Judge McPherson in *U. S. v. Alexis Club*, 98 F. 725-726, in construing section 3244, R. S., is pertinent here:

"The question has usually arisen upon the construction of a law licensing the sale of intoxicating drink, and the decisions that declare the transaction not to be a sale have naturally and properly been much influenced by the language of the particular law, and also by the fact that such a statute is generally—perhaps always—a penal statute which punishes a violation of its provisions by fine and imprisonment, and is, therefore, to be construed strictly in favor of the accused. When such a statute speaks of a 'dealer', or a 'dramshop keeper', or of 'selling by retail', or of 'the business of selling', without defining these terms, the task of definition falls upon the trial court, and there may then be little difficulty in concluding that a social club does not 'deal' in liquors, or is not engaged in the 'business' of selling within the common meaning of the words." * * *

"But section 3244 of the Revised Statutes differs in an important particular from the statutes that were construed in these cases, and in some others that were cited upon the defendant's brief. This section declares expressly what is meant by a 'retail' dealer, and necessarily implies what is meant by a 'sale'. Every person is a retail dealer 'who sells or offers for sale foreign or domestic distilled spirits or wines in less quantities than

five wine gallons at the same time'. Nothing is said about selling as a business, or selling as an innkeeper; nor is there any other limitation of the words 'sells or offers for sale' than the single limitation concerning the quantity to be sold at one time. In the face of language so clear, there is no room for construction. In my opinion, the plain meaning is that a single sale of spirits or wines, by any person, in a smaller quantity than five wine gallons, constitutes the seller a retail dealer in liquors, and makes him liable to pay to the United States a special tax of \$25.00."

Again, it will be noted that paragraph XIII of the amended complaint, alleges that "said club has at all times paid the United States internal revenue tax or license required for the retail sale of intoxicating liquors", which allegation is an admitted fact in this case.

What constitutes a *retail liquor* dealer under the United States internal revenue laws? Section 3244, R. S., sub. 4, defines a *retail dealer* as follows: "Every person who sells, or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors." The payment by the defendant of this tax is an admission that they are *retail dealers* in liquors as defined by said statute, that is that they "*sell or offer for sale foreign or domestic spirits*," etc., in less quantities than five wine gallons at a time. In the face of this admission, can appellants now be heard to say that they do not sell intoxicating liquors? Upon what other theory are they paying \$25.00 per annum to the United States as

retail liquor dealers? Section 2577 of the compiled laws of Alaska, *inter alia*, provides "That every place where distilled, malt, or fermented wines, liquors, or cordials are sold in quantities as prescribed for retail dealers by section 3244, Revised Statutes of the United States, to be drunk upon the premises, shall be regarded as a barroom; and the possession of malt, distilled, fermented, or any other intoxicating liquors, with the means and appliances for carrying on the business of dispensing the same to be drunk where sold, shall be *prima facie* evidence of a barroom within the meaning of this act, and the license therefor shall be known as a barroom license."

Under the foregoing statute any place where intoxicating liquor is *sold* in less quantities than five gallons, to be drunk on the premises, *is a barroom*, and a *barroom license* is required therefor, and under said section 3244, R. S., any place where intoxicating liquors are sold in less quantities than five gallons is a retailer and a retail license is required therefor. Hence the same facts which would constitute appellants *retail dealers* under said section 3244 R. S., would make them *barroom keepers* as defined by said section 2577, Compiled Laws of Alaska. The determining factor common to each case is the sale of intoxicating liquors in quantities less than five gallons. And since neither statute *defines a sale* thereunder, the usual definition must obtain in each case.

Now, if the manner of dispensing liquor set out in the amended complaint constitutes a *sale* thereof under the internal revenue laws (Section 3244 R. S.), then

such transaction constitutes a *sale* under the Alaska law. Appellants are in the anomalous position of *admitting* the one but *denying* the other. It means only \$25.00 tax per annum in the one case, but it means \$1000.00 per annum in the other. Hence the reason for appellants' inconsistent position in this case.

Permit us to conclude that such transactions constitute a sale, and to close this branch of the argument by quoting a pertinent paragraph from Judge McPherson's opinion in *United States v. Alexis Club*, 98 Fed. 725, in which he holds that such transactions constitute sales:

"If the result I have reached is correct, I believe it to be in the line of enforcing equality before the law; and equality before the law is a principle of American society, than which there is none more vital. Privilege and privileged classes are, and ought to be, intolerable; and it comes irritatingly near to a privilege where social clubs offering advantages of comfort and luxury that are only within the reach of the more prosperous, escape a share of the public burdens, because a refined reasoning declares that they are doing no more than distributing a common stock of liquors among their members, while the robust sense of the community, not excluding the club members themselves, know the transaction to be a sale."

SECOND QUESTION INVOLVED.

IF SUCH TRANSACTIONS DO CONSTITUTE *SALES*, THEN, DO SUCH *SALES* BY SAID "ENI" CLUB WITHOUT FIRST HAVING SECURED A BARROOM LICENSE CONSTITUTE A VIOLATION OF SECTION 2581 OF THE COMPILED LAWS OF THE TERRITORY OF ALASKA?

We are of the opinion that, aside from the decisions cited, there are two other things that are absolutely controlling in this jurisdiction in the construction of this license law, FIRST, the language of the law itself, which precludes any other construction than that such sales are in violation thereof; SECOND, the construction by the courts of a similar statute from which the Alaska statute was taken prior to the enactment of our Alaska statute.

Of these in order:

FIRST: The language of the statute (see Sec. 2571, Comp. Laws) is "*That no person, corporation, or company, shall sell, offer for sale, or keep for sale, traffic in, barter, or exchange for goods * * * any intoxicating liquors*", etc. Now, the term "person" in law is almost universally held to include corporations, partnerships and associations, but to remove all doubt or question, Congress added the words "corporation or company". The word "company" in a statute has often been held to mean and include corporations, partnerships, and voluntary associations of individuals of all or any kind. See the cases cited in

“Words and Phrases”, Vol. 2, p. 1347, under the head “Company”. There can be no reasonable doubt but that the word “company”, as used in this Act, was meant to and does include all voluntary associations of individuals.

Again, the statute (Sec. 2577, Comp. Laws) says that “a retail or barroom license shall be required for every hotel, tavern, boat, barroom, or *other place* in which intoxicating liquors are sold at retail”. And again, “That every *place* where * * * liquors are sold * * * *to be drunk upon the premises, shall be regarded as a barroom*”, and further that the possession of liquors “with the means and the appliances for carrying on the business of dispensing the same *to be drunk where sold, shall be prima facie evidence of a barroom* within the meaning of the Act, and *the license therefor shall be known as a barroom license*”.

The language of this Act is so plain that we can hardly assume that any one in good faith will contend that an association of individuals may purchase liquors, prepare a place for dispensing the same to be drunk upon the premises, and charge *the individual* ordering the same a price practically equal to that charged by the admitted and confessed barrooms of the city, without being subject to the license laws of the Territory, but such is the position taken by counsel for the appellants.

They argue that only those persons, corporations and companies who are required to have a license by the sections preceding Section 2581 are prohibited by

said last named section to sell intoxicating liquors without a license. However, the fallacy lies in their assumption that the preceding sections *do not require* all persons, corporations and companies to have a license. When the statute (Section 2571 says "*No person, corporation or company,*" shall sell, offer for sale, or keep for sale, traffic in, barter or exchange for goods in said District of Alaska, any intoxicating liquor, except as hereinafter provided, the prohibition is universal, and the inhibition is placed upon every individual and conceivable combination of individuals, and the only possible avenue of escape therefrom by appellants is *through the exception clause*. Does the exception clause—"except as hereinafter provided", cover a combination of individuals such as the "Eni" Club? What exceptions are thereafter provided by the statute? Just three classes, viz.: (1) Druggists and apothecaries; (2) sales under provisions of law, such as Marshal's sales, administrator's sales, etc., and (3) sales by those who have applied for and secured a license to sell.

It can not be claimed by the appellants that their club comes within either the first or second classes excepted from the prohibition. It follows, therefore, that appellants' club must come under the third exception, to wit, the provision providing for the application for and securing of a license, or it is absolutely prohibited from selling at all.

However, in our opinion, the words of said statute: "No person, corporation or company shall sell", etc., "except as hereinafter provided" should be construed

to mean the same as if it read, "Any person, corporation or company may sell etc., upon a compliance with the following provisions and not otherwise." In other words, the statute means that no person, corporation or company prohibited absolutely from selling intoxicating liquors but only conditionally, that is, the prohibition applies until such person, corporation or company applies for and secures a license in accordance with the provisions of the statute following the provision, "*except as hereinafter provided*", above referred to. Hence, appellants' club is forbidden to sell intoxicating liquors until it applies for and secures a license. The statute contemplates that every person, corporation or company shall apply for or secure a license before such person, corporation or company is allowed to sell. It says in plain and simple language that no person, corporation or company shall sell until it has complied with the provision requiring a license.

Our contention is that Section 2581 is as broad as Section 2571; that every one who is forbidden to sell without a license by Section 2571 is subjected to a penalty as prescribed by Section 2581. Any other construction of Section 2581 would destroy the partial effect of Section 2571. The evident intent of Section 2581 is that "any person (except druggists and apothecaries and persons making sales under provisions of law requiring them to sell personal property) who shall sell intoxicating liquors, without first having obtained a license so to do, shall upon conviction thereof be fined etc." Said Section 2581 provides that

“Any one engaging in the sale of intoxicating liquors * * * , *who is required by it* (this act) *to have a license as herein specified*, without first having obtained a license to do so as herein provided, * * * upon conviction thereof shall be fined”, etc. Now, the relative clause “*who is required by it to have a license as herein specified*” is either *explanatory* or *restrictive*; that is, it either expresses some attribute of its antecedent “anyone” or it restricts the application of such antecedent. The rule is that explanatory or appositive clauses should be set off by commas, while restrictive clauses should not be so set off. Applying, therefore, the rules of grammatical construction, the said clause is merely explanatory and is not intended to restrict the application of its antecedent to a *particular class of persons who sell liquor without a license*. Implying that there are other persons who sell without a license to whom it does not apply. Let me illustrate: If I say “Roman citizens, who are patriotic, should avenge the death of Caesar”, and place the clause “*who are patriotic*” within commas, said clause is appository or explanatory and the sentence means that all Roman citizens are patriotic and should avenge the death of Caesar. But, on the other hand, if I use the same identical words but leave out the commas, the clause, “who are patriotic”, is restrictive and limits its antecedent citizens to the patriotic class of Roman citizens, and implies that there is a class of Roman citizens who are not patriotic, and the sentence would mean merely that patriotic Roman citizens should avenge the death of Caesar. Again,

to use a parallel sentence, if I say: "Any pupil attending public school, who is required to reach the school building by nine o'clock, A. M., will be punished if tardy", and place the relative clause: "*Who is required to reach the school building by nine o'clock, A. M.*", within commas, said clause is appositive or explanatory, and the sentence means that every pupil attending public school is required to reach the school building by nine o'clock A. M., and will be punished if tardy. But, on the other hand, if I use the same identical words but leave out the commas, the clause: "*Who is required to reach the school building by nine o'clock A. M.*", is restrictive and limits its antecedent, "any pupil", to such pupils as are required to reach the school building by nine o'clock A. M., and implies that there are two classes of pupils attending school, *one* class which is required to reach the school building by nine o'clock A. M., and *another* class which is not so required.

Now, applying the same rule of grammatical construction to said Section 2581, the words: "Any one engaging, etc., who is required by it to have a license as herein provided", does not mean or imply that there are two classes of persons, *one* class which is required to have a license, and *another* class which is *not* required to have a license, that is, the relative clause is *not restrictive*, but, on the other hand, said words do mean that *every* one engaging, etc., is required to have a license, that is, the relative clause is explanatory, leaving its antecedent, *any one*, with its full, unrestricted, universal application.

There are other reasons why said Section 2581 should be construed to be as broad as said Section 2571. They are parts of the same Act and should be construed in the light of every other portion of the Act. A consideration of Section 2577 of the same Act will illumine the matter under consideration. Said Section 2577, *inter alia*, provides, "That a retailer barroom license shall be required of every hotel, tavern, boat, barroom, or *other place* in which intoxicating liquors are sold at retail". We are assuming in this part of our argument that the transactions by which members of appellants' club are furnished intoxicating liquors *constitute a sale*, having argued that matter under the first question presented in this brief. Assuming, therefore, that the transactions complained of by plaintiff constitute a *sale*, there can be no question that they constitute a sale *at retail*, and a retail or barroom license is required therefor by the above provisions of said Section 2577. The language of the section is that "*Every barroom or other place* where intoxicating liquors are sold at retail", must secure a barroom or retail license. If defendants' club is a *barroom*, the declaration is specific that it must have a license. If defendants' club is *any other place* where intoxicating liquors *are sold at retail*, the declaration is equally specific that it must have a license. But Congress has gone further in this same Section 2577, and has defined a "*barroom*" as "*every place where distilled, malt or fermented wines, liquors or cordials are sold in quantities as prescribed for retail dealers by section 3244 of the Revised Statutes of the*

United States, to be drunk upon the premises". Under this definition, appellants' club is unquestionably a *barroom*; but the said section goes another step further and makes the possession of such liquors with the appliances for drinking the same where sold *prima facie* evidence that such place is a *barroom*. Assuming that the transactions complained of constitute a sale, can any one doubt that the status of defendants' club is fixed by said Section 2577 as a *barroom*? Can any one mistake the meaning of this section when it says "That a retail or barroom license is required of every * * * barroom etc.?"

Since the appellants' club is a barroom and every barroom is required to have a license, it follows that appellants' club is required to have a license by said Section 2577. In fact, *every place* where intoxicating liquors are sold at retail must have a retail or barroom license, whether such sale is made by a person, a corporation or a company. The nature of the business determines whether or not the license is required, not the nature of the agency which makes the sale. Every place must secure a license whether it is an *aristocratic* club or a *democratic* saloon, both are *barrooms* in the eyes of the law.

Now, if every place where intoxicating liquors are sold at retail is required to have a license irrespective of who runs the place, it follows that *every one* is required to have a license before engaging in such sale. This is the irresistible conclusion from said Section 2577.

Reading said Section 2581 in the light of said Sec-

tion 2577, we would ask in the words of the explanatory clause of said Section 2581, "Who is required by it (the statute) to have a license as herein specified?" And the answer is "every one who sells at retail", which necessarily includes appellants' club. Hence, if appellants' club sells intoxicating liquors without first having secured a license so to do, being required by said Section 2577 to have a license, it is amenable to said Section 2581, and its *members, agents and officers* are guilty of a misdemeanor.

But counsel for appellants say that said Section 2581 applies only to persons, corporations and companies who are required by other provisions of the Act to have a license, and that since voluntary associations, or social clubs, are not expressly mentioned, *eo nomine* by the statute, their club is not required to have a license. In other words, they assert that said Section 2581 contemplates at least two classes to sell intoxicating liquors without a license, those who are required by the terms of the Act to have a license, and those who are not so required, and that it is only the first of these classes who can be *punished*.

What is the chief argument in support of such a construction? It is that the form of a petition for a license, prescribed by Section 2574, for a person is not adapted to the use of appellants' club; that the requirements that the applicant shall state in such petition that he will conduct the business himself and not as agent for another person, and that he will superintend in person the management of the business, and perhaps some others, are statements that appellants'

club, having no legal entity, could not make. But the same objection could be advanced on behalf of any corporation, copartnership or aggregation of persons. The form of the petition prescribed by the statute is adapted only for the application of a single person, *but does it follow that it can not be modified in form to meet the requirements of other classes of applicants?* If corporations, or companies, could not under said Section 2574 apply for licenses, we can hardly divine the purpose of embodying them in Section 2571 wherein they are prohibited from selling intoxicating liquors *except as in said act hereinafter provided.*

No corporation can take an oath or superintend or conduct a business personally. Its very nature precludes it from acting except by its officers and agents; a partnership or other aggregation of persons could do no more. They must act as individuals or by their agents and not otherwise. Are we to advise this Court, therefore, that neither a corporation nor copartnership is required by our license laws to apply for and secure a license before engaging in the sale of intoxicating liquors?

The contrary has been the practice of the District Court. Corporations and copartnerships have always applied for and secured licenses to sell intoxicating liquors under said Section 2574, notwithstanding the inadaptability of the prescribed form of petition to the nature of such corporation or copartnership. At the present time there are three copartnerships and one corporation here in Nome which are licensed to sell intoxicating liquors at retail, namely, Statie & Hill,

Caldwell & Wettergren, and Young & Van Sickle, copartnerships, and the Seward Commercial Company, a corporation, said last corporation holding a wholesale license also. We submit that when an officer of the corporation or a member of a copartnership makes and files a petition on behalf of his corporation or copartnership complying with the prescribed form of petition to the extent that the nature of the applicant will permit, that the same is all that is contemplated by said Section 2574. And such has been the uniform holding of this court as is evidenced by the licenses now issued to corporations and copartnerships.

Let us trace counsel's contention to its final analysis. What would it mean for this court to hold that appellants' club (an aggregation of individuals) cannot apply for and secure a license to sell intoxicating liquors because the form of application prescribed by statute for a *person* is not adapted for the application of any other class of applicants and for that reason could sell without such license? It would mean that the Seward Commercial Company, a corporation which is now paying to the Clerk of the District Court for both wholesale and retail liquor license annually the sum of \$3000.00, would never pay another cent; it would mean that Stadie & Hill, Caldwell & Wettergren, and Young & Van Sickle, who are now each paying the sum of one thousand dollars annually to the Clerk of this Court, would find other use for their money; but each and all of them would continue to do business at the old stand without fear of molestation

from the collector of license fees, or of prosecutions by the United States Attorney.

And this is not the whole of the result of such a ruling. Every saloon man in this Division would immediately form either a corporation or a copartnership, and thereby exempt himself from the license requirements of the statute. Why should they pay a large annual license fee to the Government, if corporations and companies can engage in the same business free?

Counsel's argument reduces itself to an absurdity, for it is certainly absurd to argue that it was the intention of Congress in enacting a revenue law to provide so patent an opening for the complete evasion and nullification thereof.

SÉCOND: The construction by the courts of a similar statute from which our license law was presumably taken before our license law was enacted.

It is a familiar rule of construction that the adoption of a law previously adopted by another State or jurisdiction adopts also the construction put upon that law by the courts of such other State or jurisdiction.

The Alaska license law was passed by Congress in 1899, 30 Statutes at Large 1337-1341. The sections and paragraphs we are construing were taken presumably from "An Act regulating the sale of intoxicating liquors in the District of Columbia", passed by Congress March 3, 1893. (See 27 St. at L., p. 563.) A comparison of Sections 1, 8 and 12 of said Act with Sections 2571, 2577 and 2581 of the Compiled Laws of Alaska, shows that the paragraphs we are construing were adopted from the said District of Columbia

Act. Section 2571 of the Alaska Act is identical with Section 1 of the District of Columbia Act, *except* that in the Alaska Act the words "corporation or company" are inserted after the word "person", and "District of Alaska" is substituted for District of Columbia, and the provision relating to brewers and distillers is omitted from the Alaska law. The parts of Section 2577 of the Alaska Act above quoted are taken word for word from Section 8 of the District of Columbia Act.

Now, prior to the passage by Congress of the Alaska Act applying the District of Columbia Act to the District of Alaska, the highest court on the District of Columbia had construed said act in its application to clubs. In *Army and Navy Club v. District of Columbia*, the Court of Appeals of the District of Columbia held that the said license law was applicable to said club. The case was decided in 1896. In this case it was held that a social club, incorporated with a limited membership, or organized for the maintenance of a library and for social purposes, which dispenses wines and liquors to its members according to a tariff of rates sufficient to replenish the stock and provide for the necessary expenses of the club, but not sufficient to pay any profit to its members, was a *barroom subject to the license fee*.

In arriving at such conclusion, said Court considers the nature of the transactions involved in distributing liquors to its members by the said club, and says: "*Here we find all the elements of a legal sale*", reserving its opinion, however, in cases of *unincorporated* clubs. It was claimed in that case by the club that the

only license issued where liquors were sold in small quantities (retail) is a "*barroom*" license, and that such club should not be considered a barroom in the ordinary sense. The Court says: "Were the word 'barroom' used in that sense there might be something in the contention; for clearly the club can not be said to be the proprietor of a barroom in the sense that the word is ordinarily used. *But we are saved trouble on this point by the definition given in the following clause of section 5.*" The Court then quotes the definition of a barroom found in Sections 5 and 8 of said act, the latter of which is found verbatim in Section 2577, Compiled Laws of Alaska, to wit:

"That every place where distilled, malt or fermented wines, liquors or cordials are sold in quantities as prescribed for retail dealers by section 3244 R. S. to be drunk on the premises shall be regarded as a barroom; and the possession of malt, distilled, fermented or any other intoxicating liquors, with the means and appliances for carrying on the business of dispensing the same to be drunk where sold, shall be *prima facie* evidence of a barroom within the meaning of this act"

* * *

"That clubs which dispensed liquors to members were to be considered barrooms in the statutory sense aforesaid, and as such *within the two foregoing provisions*, unless specially excepted, is made plain by the following provisions attached to section 6:

"Provided further that the said excise board may in its discretion issue a license to any duly incorporated club on the petition of the officers of the club, and that said excise board may in its discretion grant a permit to such club to sell intoxicating liquors to members and guests between such

hours as the board aforesaid may designate in said permit.' ”

What was the purpose of this *proviso*? Evidently not to extend the act so that its terms would include incorporated social clubs (for the word “person” used in Section 1 of the Act is sufficiently broad to include all corporations), but to *increase* the authority and power of the excise board in dealing with such clubs. By this proviso it was made *purely a discretionary matter* with the excise board whether a license to sell intoxicating liquors to members and guests should be granted to incorporated clubs under any circumstances. The excise board had no such discretionary power in reference to other applicants.

Again, said provision augmented the power of the excise board in reference to the hours during which liquor could be sold by a social club, by vesting in such board the power to determine, *in their discretion*, during what hours such club could sell, said Section 6 providing that “every barroom and other place where intoxicating liquors are sold” shall be closed and no intoxicating liquors sold from 12 o'clock midnight to 4 o'clock in the morning and on Sundays. This provision of the Act, applicable to all, was by said proviso modified so that incorporated clubs were *conditionally* excepted therefrom, that is, the excise board might, in their discretion, except them therefrom, or still further limit or restrict the hours in which such club could sell. Hence the purpose and effect of mentioning incorporated clubs in said proviso to said Sec-

tion 6 was not, as argued by counsel for appellants in court below, to extend such license law to such clubs, but to vest greater power in the excise board in dealing with them than such board had in dealing with other applicants, showing unmistakably that Congress considered the general prohibitions and provisions of said statute to include such clubs and *conditionally excepted them therefrom by said proviso*. Hense the force of Judge Shepherd's conclusion in the following language:

"If good reason exists why *bona fide* social clubs of the character and standing of the appellant should be exempt from the payment of license taxes, because their incidental dispensation of liquors to their members is without profit and unattended by some of the evil influences of the public barroom, they are for the consideration of Congress. We must declare the law as it is written."

Note that this decision was rendered in 1896, while Congress did not adopt and apply this Act to the District of Alaska until 1899. Now, following the canon of statutory construction above stated, it must be conclusively presumed that Congress in applying said Act to the District of Alaska adopted the construction given to it by the highest court of the District of Columbia. In other words, a social club which sells intoxicating liquors to its members in quantities less than five gallons as a tonic, to be drunk upon the premises, is conducting a "*barroom*" as defined by Section 2577, Compiled Laws of Alaska, and as such is required to procure a retail or barroom license as defined by said

section, and such was the intention of Congress when such section was enacted. But apparently to remove all question, Congress inserted the words "corporation or company" after the word "person" in said District of Columbia Act, in applying said Act to the District of Alaska.

Counsel for appellants made two contentions in the lower court which we desire to notice briefly together. First, they contended that Section 2571, Compiled Laws of Alaska, contains no penalty within itself, *which we concede*. Second, they contend that Section 2581, Compiled Laws of Alaska, prescribing the penalty, is not broad enough to include their club, *which we do not concede*, but have hereinabove considered. Assuming, however, for this argument that counsel are right in both contentions, does their conclusion follow, viz., that there being no penalty prescribed by the act, itself for its violation, the prohibitions contained in said Section 2571 are ineffective and said section is abortive in so far as their club is concerned?

The common law, both civil and criminal, is in force in this Territory so far as not inconsistent with the constitution of the United States and acts of Congress. Compiled Laws of Alaska, Sections 796 and 2096. Said Section 2096 provides:

"The common law of England as adopted and understood in the United States shall be in force in said District, except as modified by this act."

It was a well settled principle at common law that "In every case where a statute prohibits anything and

does not limit a penalty, the party offending therein may be indicted as for a contempt against the statute."

State v. Gaunt, 13 Oregon 115, 120;
Bishop on Criminal Law (7th ed.), pars. 237,
239.

Hence it is necessary for a statute to prescribe a penalty for the violation except in jurisdictions in which the common law is not in force; and therefore counsel's argument fails and the prohibitions contained in said Section 2571 are effective against appellants' club irrespective of the construction placed upon said Section 2581.

Upon consideration of the whole matter, we are of the opinion that the question is not in doubt; that such clubs as we are considering are clearly subject to the license laws of the Territory, and consequently all members of the club are liable to prosecution and to loss of reputation and property interest if the appellants are not restrained from further violation of the law. Hence, the action of the District Court overruling the demurrer to the amended complaint and the entering of a decree thereon should be affirmed.

Respectfully submitted,

F. M. SAXTON,
U. S. Attorney, Second Division,
District of Alaska, on behalf of
United States as *Amicus Curiae*.

No. 2513.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JOHN H. MUSTARD, SAM J. TAGGART and FRED
AYER,
vs.
E. C. ELWOOD,

Appellants,

Appellee.

BRIEF FOR APPELLANTS.

G. J. LOMEN,
O. D. COCHRAN,
W. H. METSON,
THOS. R. WHITE,
Attorneys for Appellants.

Filed this.....day of February, 1915.

FRANK D. MONCKTON, Clerk.

By, Deputy Clerk.

No. 2513.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JOHN H. MUSTARD, SAM J. TAG-
GART AND FRED AYER,

Appellants,

vs.

E. C. ELWOOD,

Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This is an action brought by a member of an unincorporated social club, or society, organized and existing in the City of Nome, Alaska, known as the "ENI" Club, to enjoin the officers of said Club from disposing of or distributing intoxicating liquors to members in said Club without a retail or bar-room license.

The defendants demurred (Tr., 9) to the amended

complaint (Tr., 3) on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and defendants elected to stand on the demurrer. Judgment (Tr., 64) was entered against them and from this judgment they appeal.

The lower court adopted as its opinion (Tr., 11) the brief of the United States Attorney and his assistant, who appeared as *amici curiae*.

The facts are so succinctly stated in the Amended Complaint (Tr., 3) that we refrain from further restating them here.

SPECIFICATION OF ERRORS.

1. The Court erred in overruling the demurrer of the defendants John H. Mustard, Sam J. Taggart and Fred Ayer to the Amended Complaint herein.

2. The Court erred in filing and entering its final judgment and decree in said action in behalf of said plaintiff and against the defendants over the objections of defendants.

ARGUMENT.

Under the issue the defendants urge the following propositions:

1. That in Alaska it is only the sales of intoxicating liquors as a business that require a license.

2. That the manner and form in which intoxi-

cating liquors are disposed of in said Club do not constitute a sale thereof within the meaning of Section 2571 or 2581, Compiled Statutes of Alaska.

3. That neither the defendants nor the Club are engaged in, or conducting, a retail liquor business, or bar-room, within the meaning of the license laws of the District of Alaska.

HISTORY OF ALASKA LIQUOR LEGISLATION.

As to the history of liquor legislation for Alaska, it may be observed that the importation and sale of intoxicating liquors was, by the Act of May 17th, 1884 (23 Stats., 24, 28) prohibited, except for certain specified purposes.

By Section 1955 of the U. S. Revised Statutes the President was given power to regulate the importation and use of intoxicating liquors.

By executive order of May 4th, 1887, the importation of intoxicating liquors in Alaska was regulated.

By executive order of March 12th, 1892, the sale of intoxicating liquors for certain purposes could be made by persons who obtained a special permit from the Governor.

By the Penal Code of March 3rd, 1899 (30 Stat., 1253) as amended and now embraced in the Compiled Statutes, Sec. 2571, etc., the above statutes and orders *were repealed*.

Endelman v. U. S., 86 Fed., 456.

Sec. 2569 of the Compiled Laws of Alaska now provides for licensing certain "*lines of business.*"

Sec. 2571 and following provide the time, place, manner and conditions for licensing the *wholesale and retail* liquor business, manner of conducting same; and penalties for "engaging in the sale of intoxicating liquors *as specified*" (wholesale or retail) without a license; and also penalties for engaging in such sale in "dry" territory, or in a portion of the district in which the sale shall have been prohibited.

THE LAW WILL BE STRICTLY CONSTRUED IN FAVOR OF
THE PARTY SOUGHT TO BE CHARGED.

In view of the conflict of the authorities, and before reviewing the cases, we will treat the questions involved as original, and new propositions in Alaska, and attempt to construe its special statutes guided by well-settled rules of construction. Among such rules are the following:

(1) The statute being penal in its nature, must be strictly construed. (2) It must be construed as a whole. (3) It must be construed with reference to the purposes and objects intended, and in the light of the history of the legislation. (4) A penal statute which creates a new crime and prescribes a punishment for it, must clearly state the *persons* and *acts denounced*. (5) The punishment prescribed must be definite and certain, and is as necessary as the definition of the crime itself. Without the penalty clause the

statute is nugatory. (6) Where general words follow the enumeration of particular classes of persons or of acts, the general words should be construed to apply to persons or acts of the same general nature or class as those enumerated. (7) It is an established rule of the Federal courts that the contemporaneous construction given to an act of Congress by the executive officers charged with its enforcement, though not controlling, is entitled to great weight.

The case of *First National Bank of Anamoose v. United States*, 206 Fed., 374 (C. C. A., 8th Cir.), is a late case well in point on the construction of such a statute as we are here considering.

That was a case in which a bank was convicted of violating a penal statute aimed against the collection by transportation companies and others, of the purchase price of interstate C. O. D. shipments of liquor. The appellate court held that the statute created a new crime and that a bank was not clearly within the class of persons it denounced and in arriving at its conclusion placed great weight upon the construction theretofore given the act by the executive officers of the government.

It appears, in the case at bar, that the "Eni" Club has run for years, in the manner stated in the complaint, without interference by any of the Federal officials in Alaska.

That the "person, corporation or company" referred to in Section 2571 are only such persons as "engage in

the sale" as "a line of business" would appear from the context and the object and purpose of the statute. Section 2571 contains *no penalty clause* and as a prohibitory statute it has no force or vitality. The "sale" is not even declared to be a misdemeanor.

Prescribing the punishment is as necessary to constitute an act a crime, as the definition of the acts constituting the crime.

Sec. 2111, *Comp. Laws*, Alaska;
People v. McNulty, 93 Cal., 427;
Ex parte Mulligan, 4 Wall., 119.

To give efficacy therefore to Section 2571, except as a preamble, it would become necessary to claim the penalties provided for in Section 2581 relate to persons and acts mentioned in Section 2571. The penalties therein prescribed do not refer to any person, company or corporation who "shall sell," etc., but only to anyone "engaging in the sale of intoxicating liquors, *as specified in this act*" (that is at wholesale or retail), and "who are *required by it* to have a license" (that is those doing business), and who have no license: and to "any person who shall *engage in* such sale" (that is at wholesale or retail as a business) where the sale thereof is prohibited, to-wit: some "portion of the district."

Nor is the punishment prescribed in Section 2581 certain. The place of imprisonment is not mentioned. For aught that appears the crime *intended* may have

been a felony. Judge Gunnison in *U. S. v. Folsom*, 3 Alaska, 226, 229, says: The statute crime "does not fall within the clearly defined lines of either a felony or a misdemeanor." Is it for the Court to declare it *either*?

The logical and common sense view and interpretation of the words "person, corporation and company" in Section 2571 is to refer them to the *class of persons* mentioned in Sections 2569 and 2581, and this brings us within the rule enunciated in the case of *First National Bank v. United States*, 206 Fed., 374, to-wit:

"Where general words follow the enumeration of particular classes of persons or of acts, the general words should be construed to apply to persons or acts of the same general nature or class as those enumerated; a rule that is especially applicable to statutes defining crimes and regulating their punishment."

Again would it not seem absurd to hold that if a statute prohibited *all* sales whatsoever by any person whatsoever, unless licensed, that it should be found necessary to provide a penalty for a sale in prohibited territory?

And why should it be found necessary to prohibit sales to Indians if all sales, except licensed sales, were prohibited? Licensed persons are also prohibited from selling liquors, not only to Indians, but also to minors, intoxicated persons and habitual drunkards.

But it will be urged that the Log-Cabin-Club conducts a bar or a barroom, and that the Statute Sec.

2577 raises certain presumptions as to what constitutes a barroom, and that under such presumptions the Club *prima facie* maintains a barroom within the license laws.

Congress in defining a barroom makes a place with "means and appliances for carrying on *the business* of dispensing," etc., *prima facie* a barroom. If not *in fact* a place of business, it would seem that the presumption should fall.

The fact that it was thought necessary to define a barroom, at all, shows that it *was not every barroom* that came within the meaning of the statute, and the definition attempted was one to bring the term within the rule of *ejusdem generis*—a public place such as "Hotel," "Tavern" or "Boat"—the places mentioned.

CONGRESS DID NOT INTEND THAT BONA FIDE SOCIAL CLUBS SHOULD PAY A LIQUOR LICENSE IN ALASKA.

It must be taken for granted that Congress knew the confusion (Tr., 14) into which the rights of social clubs had been put by the conflicting decisions of the courts, a condition which is referred to in almost every reported decision on the subject. With this knowledge and after the decision in *Army and Navy Club v. District of Columbia* (Tr., 63), it enacted the law for Alaska practically in the words of the District of Columbia Act on intoxicating liquors, except the Alaska Act omitted all reference to clubs, though the District of Columbia Act specifically provided for

licensing clubs. It would seem clear that Congress did not intend social clubs in Alaska to be affected by the liquor license laws of the Territory.

For a concise statement of the conflict of opinion referred to and the weight of authority on this question, we call the Court's attention to

Black on Intoxicating Liquors, Sec. 142;
Cuzner v. California Club, 155 Cal., 303.

In the case of

Army and Navy Club v. District of Columbia,
 8 App. D. C., 544,

the Court, in construing the act upon which the Alaska Act was framed, decided that an incorporated social club was not exempt from the payment of a license fee fixed by the act, but it appears that the District of Columbia Act contained this provision:

“Provided further, the said Excise Board may, in its discretion, issue a license to any duly incorporated club on the petition of the officers of the club and that the said Excise Board may, in its discretion, grant a permit to such club to sell intoxicating liquors to members and guests between such hours as the Board may designate in such permit,”

thus indicating that it was the intention of Congress in that act to include clubs among those to be regulated by the act.

It could hardly be contended that a legislature, by

any license law yet passed, intended to compel the members of a family who contributed to the common table, to pay a liquor license if wine were served; nor has it ever been decided that any such laws applied to an ordinary arrangement where several persons, other than members of a family, join in living together for economical or other reasons. It is not until some such arrangement arrives at that point where it is called a "club" that difficulties in classifying it arise. It is true, as some court has said, that there are "good" clubs and "bad" clubs. There are "clubs" which there is no doubt the license laws were intended to reach; clubs which are formed for the purpose of selling liquor without paying the license imposed on the business of selling liquors. But there are also clubs organized for social and intellectual enjoyment among members, incidentally distributing liquor to members, which it would never occur to one a legislature meant to burden with the usual business liquor license tax unless the Legislature unmistakably so expressed itself.

The view we have attempted to express is evidently shared by the courts which have rendered the latest opinions upon this subject.

In the late case of *State ex. rel. Boston Club of New Orleans v. Fitzpatrick*, 60 So., 691; 131 La., 1079; 43 L. R. A. (N. S.), 608 (1913), where a social club of long standing applied for a writ of mandamus to require the issuance of a license for the sale of liq-

uors without being obliged to pay the taxes or be subjected to the regulations governing barrooms, etc., the Court ordered the writ to issue and took occasion to comment as follows:

“It is a matter partly of admission in this case and otherwise of common information that the social club now before the court and other similar organizations occupy and have for generations occupied a most prominent position in the life of this city and State; that their homes whilst usually valuable and ornamental are as innocuous to the general public, which is excluded from them, as well kept mausoleums; and as the lawmakers are as familiar with these conditions as is the community at large, it is reasonable to assume that if they had intended to impose upon the members of these organizations all the restrictions which are imposed upon persons desiring to establish barrooms, cabarets, and other places of ‘business,’ they would have found appropriate language in which to express their purposes.”

So in the case of *State v. University Club*, 35 Nev., 475, 130 Pac., 468 (1913), which was an action brought by the State to recover from appellant the amount of a retail liquor license, the case presented the question of the liability of a bona fide social club, disposing of liquors to members and guests, to pay the State and county retail liquor licenses, a case almost identical with the one at bar, and the Court construed the Nevada Statute, which reads as follows:

“On the first day of July, A. D. one thousand nine hundred and five, and annually thereafter on

January first, every person, firm, company or corporation, manufacturing or selling, either at retail or wholesale, any spirituous, malt or vinous liquors shall, in addition to the licenses now provided by law, take out a State liquor license as hereafter provided, which license shall not be transferable by sale, assignment or otherwise. . . .

“Sec. 3. The several sheriffs of the respective counties of this State are hereby made the collectors of, and authorized and required to issue and collect, said licenses, and shall, upon the payment of fifty (\$50) dollars, issue a retail State license to any person, firm, company or corporation engaged in selling spirituous, malt or vinous liquors in quantities less than five gallons. . . .

“Section 121 of the General Revenue Act (Rev. Laws, Sec. 3733) provides: ‘Any person or persons who may dispose of any spirituous, malt or fermented liquors or wines, in less quantities than one quart, shall, before the transaction of any such business, take out a license from the sheriff of the county in which he or she proposes to do such business, and pay therefor the sum of ten dollars per month’,”

and said:

“Where, as in this State, a statute imposes a license on persons engaged in the ‘business’ of selling liquors, the courts have universally held that bona fide social clubs are not liable to take out such a license for the reason that they are not engaged in the ‘business’ within the meaning of the statute” (citing a number of cases).

“The title of the act relative to State liquor licenses, the form of the license prescribed in said act and the provisions of the statute relative to the county liquor licenses specifically refer to the

‘business’ of disposing of liquor by retail or whole-sale.”

“The term ‘business’ as used in these statutes clearly, we think, means ‘business’ in a trade or commercial sense as held by the courts construing similar statutes.”

“As the question is one entirely subject to legislative control, the Legislature can, if it so desires, amend the law so as to require licenses from social clubs the same as it now requires the same from persons engaged in the ‘business’ of selling liquor.”

This case seems to be exactly in point; the facts are the same and the statutes construed almost identical, with the case at bar.

The case of

Cuzner v. The California Club, 155 Cal., 303,

was one brought as the one at bar by a member of the Club, a social organization of Los Angeles, to enjoin the selling or serving of liquors upon the ground that to do so would violate the provisions of a city ordinance. A demurrer to the complaint was overruled, defendant declined to answer, judgment was entered for plaintiff and defendant appealed. The case was reversed with instructions to sustain the demurrer.

The only question presented by the appeal was whether the ordinance that imposed a license tax of \$100.00 per month upon “every person, firm or corporation conducting, managing or carrying on the

business of a retail liquor dealer was applicable to the defendant club."

The ordinance contained, among other provisions, the following:

"For the purpose of this ordinance a retail liquor establishment is defined to be any place where spirituous, vinous, malt or mixed intoxicating liquors are sold, served or given away in quantities of less than five gallons, to be drunk either upon the premises or elsewhere."

The Court said (p. 309):

"Reasonably construed, these provisions regarding liquor dealers must be held to have been intended to apply only to such persons, etc., as are engaged in the business of selling liquor in the sense in which the term 'business' is ordinarily used in that connection."

and (p. 311):

"The term 'business' as used in a law imposing a license tax on businesses, trades, professions and callings, ordinarily means a business in the trade or commercial sense, one carried on with a view to profit or livelihood. A bona fide social club, . . . in its transactions with its members in the carrying on of the club-house, looking simply to the giving to them such privileges in the property devoted to bona fide club purposes as they are all, in common, entitled to under the constitution and rules of the club, is not engaged in business at all in a commercial or trade sense, as ordinarily understood."

and (p. 316):

“If it be deemed proper by the city of Los Angeles that bona fide social clubs engaged in the transactions of the kind here involved should pay a license tax or be in any way subjected to the operation of reasonable regulations relative to the sale or disposition of intoxicating liquors, it will be a very simple matter for it to so provide by the use of language that would clearly show such an intent.”

There are many other cases to the same effect, with which we do not deem it necessary to burden this brief. Many of them are mentioned in the opinion of the trial court (Tr., 16) with the admission that they are authorities against the opinion.

Under the circumstances and the language of the Alaska License Law, it appears to us that there can be no question but the Congress plainly indicated in the Alaska law the intention to license only the “business” of selling intoxicating liquors, for in Section 2574, page 785, Comp. Laws of Alaska, we find that the application for license shall state:

“Fourth. That said applicant intends to, and if so licensed will, carry on such *business* for himself and not as agent for any other person.

“Fifth. That said applicant intends to, and if so licensed will, superintend in person the management of the *business* licensed.”

In Section 2577, we find:

“Provided, That the fee for a retail license for
“road-houses on regular post roads or trails where
“the population within two miles of the place where
“the *business* is to be conducted,” etc.; and the same
section thereafter three times refers to the *business* to
be conducted under the license.

Section 2579 provides for examinations to be made
by the authorities during *business hours*.

Section 2584 provides against licensing a person to
conduct such *business* or to have such *place of business*
near a school.

Section 2585 reads:

“That all applicants who have had a license
during the preceding year shall apply for a re-
newal of such license on or before November first
of each license year and shall be permitted to
continue business until license shall be granted or
refused by the court or judge thereof,” etc.

In the case of

United States v. Jourden, 193 Fed., 986.

this Court considered the license law of Alaska as
one governing the “business” of selling liquors.

Such cases as

United States v. Alexis Club, 98 Fed., 725.

interpreting the United States Revenue Laws are

not in point here because the rule in Internal Revenue cases is that the United States shall be given the benefit of every doubt, while, in the State and Territorial license cases, the party sought to be charged is given the benefit of the usual strict construction of penal statutes; nor are such cases in point as those in which a club is organized for the purpose of evading the law or where a Sunday or prohibition law is violated.

In our opinion, the demurrer should have been sustained.

Respectfully submitted.

G. J. LOMEN,
O. D. COCHRAN,
W. H. METSON,
THOS. R. WHITE,
Attorneys for Appellants.

No. 2513.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN H. MUSTARD, SAM J. TAGGART and FRED
AYER,

Appellants,

vs.

E. C. ELLWOOD,

Appellee.

**Petition for a Rehearing on Behalf
of Appellants.**

G. J. LOMEN,
O. D. COCHRAN,
W. H. METSON,
THOS. R. WHITE,
Attorneys for Appellants.

CATLIN, CATLIN & FRIEDMAN,
Of Counsel.

Filed this.....day of June, 1915.

F. D. MONCKTON, Clerk,

By....., Deputy Clerk.

THE JAMES H. BARRY CO.

Filed

JUN 23 1915

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JOHN H. MUSTARD, SAM J. TAG-	}	No.
GART and FRED AYER,		
	<i>Appellants,</i>	
VS.		2513.
E. C. ELLWOOD,	}	

PETITION FOR A REHEARING ON BEHALF
OF APPELLANTS.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals, for the Ninth
Circuit:*

Appellants respectfully petition that the decision of this Court herein be set aside and that a rehearing of the cause be granted.

In the opinion of counsel for the appellants no more important question touching on Alaskan matters has been brought into the Courts of the United States in a decade or more. Viewed from the narrow point of

liquor selling the case would be of no great public interest, but from the actual viewpoint, the mere question of a privilege to dispense liquor fades into insignificance. We hope to convince the Court that an institution, the influence of which upon life, culture and civilization in a far off territory is about to fall by reason of a prohibitory tax, and that upon its ruins another institution, not to be encouraged, will grow and gain strength.

In the consideration of this petition we earnestly impress upon the Honorable Court the ofttimes demonstrated truth that pioneer peoples cannot be justly governed by the laws made for established communities.

The construction of a statute providing for the sale of alcoholic liquors in Alaska is the only legal question involved in this case. A full consideration of the opinion of the Court, as well as of the dissenting opinion of Judge Ross, leads us to the conclusion that if we are again allowed to present our arguments, we can convince the Court that upon considerations of public policy alone the harshness of the rule as declared, in so far as it applies to clubs organized for social and literary purposes in Alaska, should be softened.

The District of Columbia is a small territory, very densely populated. It contains within its borders a great modern city, the capitol of the nation, schools, universities, and all that go to make up the culture and refinement of a highly civilized and resourceful peo-

ple. In its wisdom, Congress has legislated for its needs with full knowledge and understanding of its requirements, and the Courts have construed and interpreted its laws, seeking in so doing to search out and declare the true intent of Congress.

In 1893, a law regulating the sale of intoxicating liquors was enacted (27 Stats., 563) and was later construed and interpreted by the Court of Appeals of the District of Columbia, and, according to its plain and unequivocal provisions, incorporated clubs are held to be required to secure license as a place where liquors are sold at retail. *Army & Navy Club v. Dist. of Columbia*, 8 App. D. C., 544.

We cannot find any ground upon which to disagree with that construction of the law, as it seems to us apparent that Congress undoubtedly intended by the language of that part of Section 6 of the Act quoted in the majority opinion of the Court in this case, to tax clubs in the territory affected by that statute, which reads as follows:

"And provided, further, the said Excise Board may, in its discretion, issue a license to any duly incorporated club on petition of the officers of the club, and that the said Excise Board may, in its discretion, grant a permit to such Board to sell intoxicating liquors to members and guests between such hours as the Board aforesaid may designate in said permit."

The portion of the Act quoted above in italics (which are our own), is an express definition of a

kind of person which is compelled to secure a license. The second portion simply gives the Excise Board power to allow such persons special privileges.

Alaska is immense in the extent of its territory, while in the numbers of its population, it is almost inconsiderable. Probably there is no territory under the sun where there are so few civilized inhabitants compared with the immensity of the area inhabited. The actual figures are amazing, about 64,000 people, half of whom are whites, occupy a territorial area of 586,400 square miles. For every white inhabitant, there is approximately 20 square miles. To every five white men, there is one white woman. In the schools established by the Government, there are altogether about 700 children. We have no figures concerning the public schools of the District of Columbia, but we assume that as its population is not a great deal less than that of the City of San Francisco, the figures can be but little different. The records of the school department of San Francisco disclose two schools of over 1100 pupils, five of over 1000, and more than a score of over 700, and a total attendance of over 60,000—a little less than the whole population of Alaska.

In the District of Columbia, there are thousands of inhabitants to every square mile of its territory. Home life there is the common thing; while in Alaska, where the comparative number of women and children are so strikingly few, it is the rare thing. In the District of Columbia, one may in a moment step from

the home or the club to the lecture room of a university, or to one of the greatest libraries in the world, or to the theatre, the opera, the lecture platform, or to any of the numberless things that go to the making of the social life of a modern American population center.

In Alaska, where there are but seven cities of over one thousand, social conditions are, and of need must be, so different from those existing in the District of Columbia that a comparison of them would be ridiculous, and we would not indulge in it were it not that from this wide difference we expect to be able to convince this Court that Congress by its enactment of the liquor license law for Alaska did not intend to destroy one of the few institutions that do in truth go to aiding in the real progressive development and preservation of culture and right living.

Alaska is icebound and in darkness over its greatest part for much more than half of the year. Travel, as that term is generally understood, is quite impossible, and the men who are accomplishing the pioneering in this great territory are for many months confined to the small population centers.

They may, during this period of enforced idleness, enjoy the comforts of their home, if they happen to belong to the few who are so fortunate as to have a home. If they have not, they may stay in such a house as they have been able to raise over their heads, or

they may go to a club, or they may go to the true bar-room.

The above description is not far-fetched, but is literal truth.

Congress when it legislated for the District of Columbia knew of the social conditions there existing. In that portion of Section 6, italicized by us quoted above, it required clubs to take a license as a retailer, after which in the portion following the italics, it gives the Board of Excise power to grant special privileges to clubs.

In legislating for Alaska, Congress is presumed to have been familiar with such conditions, and being so, intentionally omitted from the Act all mention or notice of clubs and left in it all other things enumerated. *By this omission, with full knowledge of the conditions in Alaska, and the actual hardship upon loyal and faithful citizens the heavy taxing of clubs would entail, Congress published its intention to exempt them.*

The statute is a revenue law and as such is capable of being subjected to the rules of liberal construction. But it is also penal, which would, if it were not also a revenue law, put it into the class that will only bear the strictest of construction. There is some doubt raised by the authorities as to whether revenue laws which contain penal provisions are not open to liberal construction. The weight seems to favor liberal construction, and it seems clear that in a case like the one under consideration, where there is no attempt to en-

force the penal provisions, the rule of liberal construction may be followed. But even if this is so, it is not a question in the case, for we believe that the most liberal construction would not permit of the reading into the Alaska Act, the language or spirit of the law passed for the District of Columbia, when Congress expressly discarded all mention of clubs with full knowledge of conditions in both places.

If there was any purpose in extracting the mention of clubs from the Alaska law other than to exempt them from the tax, would not Congress have inserted mention of them in the later portion so that it would read "every hotel, tavern, bar-room, *club*, or other places, etc."? The principle that the expression of one thing excludes all others would seem to have added force where lawgivers intentionally omit to express themselves as to a thing by actually striking from the law all mention of it when they were well aware of the irreconcilable decisions of the State Courts upon the subject, which they could have settled by inserting one word in the law. We respectfully urge that if Congress decided to leave from the law the one word that would have made it certain, this Court is in error to read it in.

Under the construction of this Act by the Court, a grave injustice will be done to a loyal people and an evil condition thrust upon them, that would result in the further depopulation of a territory already sadly

in need of population. Such could not have been the intention of Congress. The spirit of this law must be like the spirit of all laws,—benevolent. No law is intended to bring about evil.

Moreover, the saloon, bar-room, cafe or whatever name may be given to the place where liquor is distributed broadcast to the people, it is admittedly the most evil of all known methods of distribution. The *bona fide* club is the least evil. In the one there is nothing for the guest to do but consume liquor. In the other there is library, choice of companionship, temperance and something of the home. It seems inconceivable that Congress intended, by a prohibitory tax, to destroy the lesser evil to the benefit of the greater.

Deeply impressed by the reasoning in the minority opinion of Judge Ross, in closing our petition for a rehearing, we respectfully submit that its reasoning should be again carefully considered by the Court.

The figures given in the first part hereof concerning the relative population of Alaska and the District of Columbia, we take from New International Encyclopedia (1915), subjects Alaska and District of Columbia, and use "round" numbers. The San Francisco school data comes from a late report to March, 1915, not yet circulated or published, which is in the office of the Superintendent of Public Schools, the last published figures being somewhat smaller. (Di-

rectory of The San Francisco Public Schools, 1912-1913.)

Dated, San Francisco, June 22nd, 1915.

Respectfully submitted.

G. J. LOMEN,
O. D. COCHRAN,
W. H. METSON,
THOS. R. WHITE,
Attorneys for Appellants.

CATLIN, CATLIN & FRIEDMAN,
Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above-entitled cause, and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

THOS. R. WHITE,
Of Counsel for Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JACK LESAMIS, JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY and SAM
SALLO,

Appellants,

VS.

H. GREENBERG,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Alaska, Second Division.

Filed

DEC 16 1914

F. D. Monckton,

United States
Circuit Court of Appeals
For the Ninth Circuit.

JACK LESAMIS, JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY and SAM
SALLO,

Appellants,

vs.

H. GREENBERG,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Alaska, Second Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of G. J. Lomen.....	108
Answer and Cross-complaint, Supplemental...	40
Answer of Jack Lesamis, John Tyapay and Andy Garbin, Separate.....	21
Answer of George Stanley and Sam Sallo, Sep- arate	15
Answer to Supplemental Answer and Cross- complaint, etc., Reply and.....	45
Assignment of Errors.....	244
Attorneys of Record, Names and Addresses of.	1
Bond on Appeal.....	254
Certificate of Clerk U. S. District Court as to Execution, etc.	258
Certificate of Clerk U. S. District Court to Tran- script of Record.....	261
Citation	264
Complaint in Equity.....	3
Complaint, Supplemental Answer and Cross...	40
Conclusions of Law.....	66
Consent to Approval of Statement of Evidence.	242
Cross-complaint, Supplemental Answer and....	40

Index.	Page
Decree	81
Defendants' Exceptions to the Findings of Fact and Conclusions of Law.....	67
Defendants' Objections and Exceptions to Judgment	86
Deposition of Andy Garbin (Part of).....	176
Deposition of Sam Sallo (Portion of).....	206
Exceptions, Bill of.....	124
Exceptions to Findings and Conclusions, Defendants'	67
Exceptions to Judgment, Defendants' Objections and	86
Execution, Writ of.....	87
Exhibit—Receipt for Gold-dust.....	176

EXHIBITS:

Plaintiff's Exhibit "A"—Agreement, March 19, 1910, Between Tyapay et al. and Greenberg	126
Plaintiff's Exhibit "B"—Agreement, March 19, 1910, Between Garbin et al. and Greenberg	128
Plaintiff's Exhibit "C"—Agreement, Sep- tember 1, 1911, Between Grenberg et al. and Boskovitch et al.....	136
Plaintiff's Exhibit "D"—Deed, June 17, 1911, Tyapay et al. to Greenberg.....	141
Plaintiff's Exhibit "E"—General Power of Attorney—Tyapay to Greenberg.....	146
Plaintiff's Exhibit "F"—Telegram, July 7, 1911, Garbin to Greenberg et al.....	149

Index.

Page

EXHIBITS—Continued:

Plaintiff's Exhibit "G"—Letter, October 20, 1910, Tyapay and Lesamis to Greenberg	150
Plaintiff's Exhibit "H"—Letter, February 20, 1912, Tyapay to Greenberg.....	152
Plaintiff's Exhibit "I"—Letter, Dated June 14, 1911, ——— to John Lichtenberg	174
Plaintiff's Exhibit "J"—Check.....	181
Plaintiff's Exhibit "K"—Check.....	182
Plaintiff's Exhibit "L"—Statement.....	183
Plaintiff's Exhibit "M"—Statement.....	200
Plaintiff's Exhibit "V"—Agreement, December 27, 1911, Between Stanley and Garbin	216
Defendants' Exhibit No. 5 for Identification—Letter, December 17, 1912, Greenberg and Tyapay to Lesamis....	229
Findings of Fact and Conclusions of Law.....	55
Motion for Confirmation of Sale.....	118
Motion for Order Quashing Execution.....	107
Names and Addresses of Attorneys of Record..	1
Notice of Motion for Approval of Statement of Evidence, Waiver of Notice and Consent to Approval	242
Objections and Exceptions to Judgment, Defendants'	86
Objections of Defendant to Confirmation of Sale	120
Opinion	50
Opinion	105

Index.	Page
Opinion on Motion to Quash Execution, etc....	113
Order	256
Order Allowing Appeal.....	257
Order Allowing Defendant Thirty Days to File Bill of Exceptions.....	102
Order Approving Statement of Evidence.....	243
Order Confirming Marshal's Sale.....	122
Order Denying Motion for a New Trial.....	102
Order Denying Motion for Continuance of Hear- ing of Motion for New Trial.....	102
Order Enlarging Time to File Record.....	263
Order Overruling and Denying Motion for an Order Vacating Certain Orders Made No- vember 1, 1913.....	103
Order Overruling Motion for Extension of Time to File Bill of Exceptions, etc.....	102
Order Relative to Motion for Extension of Time to File Bill of Exceptions, etc.....	101
Order Settling and Allowing Bill of Exceptions	241
Petition for an Order Allowing Appeal.....	252
Praecipe for Transcript of the Record.....	259
Proposed Bill of Exceptions.....	124
Reply and Answer to Supplemental Answer and Cross-complaint of Defendants George Stanley and Sam Sallo.....	45
Reply to Separate Answer of Jack Lesamis, John Tyapay and Andy Garbin.....	31
Reply to Separate Answer of George Stanley and Sam Sallo.....	37
Separate Answer of Jack Lesamis, John Tyapay and Andy Garbin.....	21

Index.

Page

Separate Answer of George Stanley and Sam Sallo	15
Summons	1
Supplemental Answer and Cross-complaint....	40

TESTIMONY ON BEHALF OF PLAINTIFF:

ECKHART, HUGO	144
Cross-examination	145
GREENBERG, H.	124
Recalled	146
Cross-examination	154
Redirect Examination	171
Recross-examination	173
Redirect Examination	174
Recalled	175
Recalled	196
Cross-examination	197
Recalled in Rebuttal.....	234
HOBBS, J. F. (in Rebuttal).....	237
Cross-examination	237
Redirect Examination	239
Recross-examination	240
LEVY, W. L.....	197
Recalled in Rebuttal.....	234
Cross-examination	235
MAGIDS, SAM	177
Cross-examination	189
Redirect Examination	196
In Rebuttal	234
MORAN, MARTIN	174

Index.	Page
TESTIMONY ON BEHALF OF PLAIN- TUFF—Continued:	
MURPHY, PHILIP (in Rebuttal)	235
Cross-examination	236
STANLEY, GEORGE	177
Cross-examination	177
TESTIMONY ON BEHALF OF DEFEND- ANTS:	
GARBIN, ANDY	207
Cross-examination	213
Redirect Examination	221
Recalled	230
Cross-examination	230
Redirect Examination	230
LESAMIS, JACK	221
Cross-examination	226
Redirect Examination	228
Recross-examination	228
Recalled	229
Recalled	231
MORAN, M. F.	219
Cross-examination	220
Redirect Examination	221
STANLEY, GEORGE	230
Recalled	232
Cross-examination	232
Redirect Examination	233
Undertaking on Appeal	254
Writ of Execution	87

Names and Addresses of Attorneys of Record.

J. F. HOBBS, Nome, Alaska,
WILLIAM A. GILMORE, Nome, Alaska,
Attorneys for Plaintiff.

G. J. LOMEN, Nome, Alaska,
O. D. COCHRAN, Nome, Alaska,
Attorneys for Defendants.

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GAR-
BIN, GEORGE STANLEY and SAM SALO,
Defendants.

Summons.

The President of the United States of America, to
Jack Lesamis, John Tyapay, Andy Garbin,
George Stanley and Sam Salo, Defendants,
Greeting:

You are hereby summoned and required to appear and answer the complaint of the plaintiff on file in the office of the above-entitled court, at the city of Nome, Alaska, within thirty (30) days from the service of this summons upon you, or judgment for want thereof will be taken against you;

And you are hereby notified that if you fail to answer the said complaint, the plaintiff will apply

to the Court for the relief demanded in said complaint.

WITNESS the Honorable CORNELIUS D. MURANE, Judge of said Court, and the seal of said Court hereto affixed this 1st day of November, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States, one hundred and thirty-sixth.

(Court Seal) J. SUNDBACK,
Clerk of the District Court, District of Alaska, Second Division.

By J. Allison Bruner,
Deputy. [1*]

United States of America,
District of Alaska,
Second Division,—ss.

I hereby certify that I received the annexed summons on the 18th day of November, 1911, and thereafter on the 20th day of November, 1911, I served the same at Kiana, Alaska, upon Jack Lesamis, Andy Garbin, George Stanley and Sam Salo, by delivering to and leaving with each of them a copy thereof, together with a certified copy of the complaint filed therein. After due and diligent search I was unable to find John Tyapay.

Returned this 24th day of November, 1911.

T. C. POWELL,
United States Marshal.
By C. H. Hawkins,
Deputy.

Marshal's Costs: 4 Services—\$24.00.

*Page-number appearing at foot of page of original certified Record.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Summons. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome, Dec. 13, 1911. John Sundback, Clerk. By J. Allison Bruner, Deputy. J. H. Hobbes and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. 3348. [2]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GAR-
BIN, GEORGE STANLEY and SAM SALO,
Defendants.

Complaint in Equity.

Comes now plaintiff and for cause of action against the defendants above named alleges as follows:

I.

That heretofore and on the 19th day of March, 1910, and for a long time prior thereto, the defendants, Jack Lesamis, John Tyapay and Andy Garbin, were the owners and in the possession of certain placer mining claims situated in the Noatak-Kobuk Mining and Recording District, District of Alaska, and that the legal titles to the said placer mining claims stood in the names of the said defendants by

virtue of certain placer locations by them theretofore made in said mining district; that on the said 19th day of March, 1910, the said defendants, Jack Lesamis, John Tyapay and Andy Garbin entered into certain written instruments whereby and wherein they agreed with the plaintiff to form a copartnership to work and mine the said mining claims and to give and convey to the plaintiff an undivided one-quarter ($\frac{1}{4}$) interest in all of said placer [3] claims, lode claims and water rights then owned, acquired or to be acquired by the said defendants, in consideration that the plaintiff furnish them with provisions from time to time from the said 19th day of March, 1910, up to and until July, 1910, and agreed to pay said defendants the sum of six thousand dollars (\$6,000.00) in cash, and thereafter the further and additional sum of twenty-four thousand dollars (\$24,000.00) from the net profits of the mining operations to be thereafter conducted and had upon said mining claims; that the said agreement between the parties, plaintiff and said defendants, was reduced to writing and incorporated in the following two written instruments, which said instruments were executed, witnessed and delivered between the parties, to wit:

“AGREEMENT.

Klery Creek March 19th 1910.

Know all men by these presents, That we the undersigned John Tyapay Andy Garbin and Jack Lesamis of the Noatak-Kobuk recording district District of Alaska, and H. Greenberg of Nome Ala. enter into this agreement, that for the sum of one dollar lawful

money of the United States in hand paid and other valuable services, for same services H. Greenberg is, and shall be a full fledged partner with the above-mentioned parties & have one quarter undivided interest in all claims, lodes, water rights acquired or to be acquired and owned by the above-mentioned parties. It is further agreed that H. Greenberg is to furnish the above-mentioned parties with provisions from time to time up to till July 1910.

ANDY GARBIN. (Seal)

JACK LESAMIS. (Seal)

JOHN TYAPAY. (Seal)

H. GREENBERG.

Witnesseth:

SAM MAGIDS.

HERMAN BERNHARDT.” [4]

“This indenture made the 19th day of March in the year of our Lord one Thousand nine hundred and ten between the undersigned Andy Garbin, Jack Lesamis and John Tyapay of the Noatak-Kobuk Recording District, of the District of Alaska parties of the first part and H. Greenberg of Nome Alaska party of the second part witness, That the said parties of the first part, for and in consideration of the sum of Thirty Thousand *do* dollars (\$30000.00).

Six Thousand dollars (\$6000.00) in lawful money of the United States of America to them in hand paid by said party of the second part, The receipt whereof is hereby acknowledged, and the balance of Twenty four thousand to be paid of the first money taken out of the ground hath, granted, bargained, sold, remised, released and forever quit-claimed, and by

these presents doth grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part, his heirs and assigns one quarter ($\frac{1}{4}$) undivided of all mining claims located, surveyed, recorded and held by said parties of the first part situated in Noatak-Kobuk mining district district of Alaska, together with all the dips, spurs and angles and also the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges, and franchises thereto incident, appendent and appurtenant, or therewith usually had or enjoyed; and also all and singular the tenements, hereditaments and appurtenances, thereunto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well as in law as in equity, of the said party of the first part of, in or to the said premises and every part or parcel thereof, [5] with appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns forever warranting and defending the same against the claims of all persons, save and except the United States.

ANDY GARBIN. (Seal)

JACK LESAMIS. (Seal)

JOHN TYAPAY. (Seal)

Witnesseth:

SAM MAGIDS.

HERMAN BERNHARDT."

II.

That thereafter and at all times since said 19th day of March, 1910, plaintiff has fulfilled and carried out the terms, covenants and conditions on his part to be done, made, kept and performed, and did furnish the said defendants with the provisions mentioned in said written instrument, and did pay to said defendants the said sum of six thousand dollars (\$6,000.00) in lawful money of the United States, and the said defendants thereupon and in pursuance of the terms of said written instrument, entered into the mining copartnership known, named and called the KLERY CREEK MINING COMPANY, and thereupon began mining operations upon the said placer claims hereinafter named and set forth.

III.

That at the time said instruments were executed and delivered, the said defendants, Jack Lesamis, John Tyapay and Andy Garbin, were the owners and in the possession of the following placer mining claims: [6]

Discovery Claim; One Above Discovery, Two Above Discovery, Six Below Discovery, Fraction Between Two and Three Above Discovery, Association Fraction Between Discovery and Starr, California Association, L. L. Klery Creek, Opposite Discovery, Butte Association, R. L. Klery Creek opposite Discovery, Oregon Association (Bench and Creek) adjoining upper and Starr, and lower end of 1 and 2 Above Discovery, Bench Seven, opposite Creek Claim Seven Below, Gold Hill Association R. L. opposite 1, 2, 3 and 4 creek claims, all the fore-

going claims being situated on Klery Creek, *it* its benches. Also Honey Claims, one and two, between Klery and Bear Creeks, Northpole Association L. L. adjoining claims, last above described, One and two Above Discovery, on Bear Creek, Goldfield Association opposite 1 and 2 above and 1 below L. L. Bear Creek, Rich Association on Bear Creek, and adjoining 2 above, Central Association, adjoining No. 1 below, on Central Creek, Discovery on Central Creek, One above on Central Creek, One Below on Central Creek, Fraction (Garbin) on Central Creek, Discovery Claim on Jack Creek, a tributary of Klery; all interest of said first party in all mining claims owned in whole or part in Rocky Creek, in said mining and recording district. And thereupon the said KLERY CREEK MINING COMPANY entered into possession of said claims and began to mine and operate the same as a mining copartnership; that thereafter the said KLERY CREEK MINING COMPANY operated the said placer mining claims on the said Klery Creek and vicinity in the Noatak-Kobuk Recording District, between said 19th day of March, 1910, and the 10th day of August, 1911; that during said term and time said mining claims were operated at a loss to the said mining copartnership at approximately the sum of eighteen [7] thousand dollars (\$18,000.00); that said indebtedness is due to the firm of Robinson, Magids & Co., or assignee, for goods, wares and merchandise and for money advanced at the request of said KLERY CREEK MINING COMPANY.

IV.

That on or about the 10th day of August, 1911,

the said KLERY CREEK MINING COMPANY executed several written leases upon several of the said mining claims above mentioned belonging to the said KLERY CREEK MINING COMPANY for the purpose of having said copartnership property mined during the present winter, under all of which said leases certain stipulated royalties were reserved to be paid to said mining copartnership.

V.

That heretofore and on or about the 13th day of August, 1911, the defendants, Andy Garbin and Jack Lesamis, in violation of the terms and conditions of the said copartnership instruments, entered into a conspiracy to defraud this plaintiff of his rights in the said KLERY CREEK MINING COMPANY, and thereupon collusively and fraudulently and without any consideration, transferred and assigned all of their right, title and interest in the said KLERY CREEK MINING COMPANY, copartnership property, consisting of said placer mining claims on Klery Creek and vicinity in said Noatak-Kobuk Recording District, to said defendants, George Stanley and Sam Salo, both of whom were and are insolvent.

VI.

That the said written instruments executed and delivered as above alleged on the 19th day of March, 1910, were [8] thereafter duly recorded in the office of the recorder of the said Noatak-Kobuk Recording District, District of Alaska, on the 29th day of March, 1910, and the said defendants, George Stanley and Sam Salo, took and received the said transfers of title from the said defendants, Jack

Lesamis, and Andy Garbin, with full knowledge and notice of the said written instruments of the said copartnership and with full knowledge and notice of the fact that the said KLERY CREEK MINING COMPANY had outstanding indebtedness at said time of approximately the sum of eighteen thousand dollars (\$18,000.00.) incurred in mining operations, over and above all production of gold from said mining claims so conveyed.

VII.

That the said transfer from the said defendants Lesamis and Garbin to the said Stanley and Salo were made for the purpose and with the intent of changing and modifying the said original copartnership agreement, and immediately thereafter the said defendants, Stanley and Salo, threatened to and did claim, and do now claim, that they, by reason of the said assignment were and are now entitled to the sum of twenty-four thousand dollars (\$24,000.00) from the first gross output of said mining claims, and now claim and assert that they are entitled to said sum of twenty-four thousand dollars (\$24,000.00) before the said indebtedness of eighteen thousand dollars (\$18,000.00) is paid or the expenses of operating the said mining claims is paid and defrayed.

VIII.

That the said defendants, Stanley and Salo, are now [9] claiming to be the lessors of the lessees who are working the said mining claims and threaten to and will collect or attempt to collect the royalties and the entire output of the said placer mining

claims belonging to the said KLERY CREEK MINING COMPANY, under their alleged claim for payment of twenty-four thousand dollars (\$24,000.00) alleged to be due them in disregard of the present indebtedness of said KLERY CREEK MINING COMPANY, and contrary to the intent of the formation of said KLERY CREEK MINING COMPANY, as above alleged.

IX.

That heretofore and on the 24th day of October, 1911, one Philip Murphy, claiming an assignment of the account of said Robinson, Magids & Co., creditor of said KLERY CREEK MINING COMPANY, began an action at law in the above-entitled court for the collection of the sum of seventeen thousand one hundred twenty-four dollars (\$17,124.00) and interest against the said KLERY CREEK MINING COMPANY, consisting of the defendants, Jack Lesamis, John Tyapay and Andy Garbin, and this plaintiff, and caused to be issued a writ of attachment against the mining property of said KLERY CREEK MINING COMPANY; that said amount is justly due the said Robinson, Magids & Co. or their assignee, the said Philip Murphy, and should be paid from the first gold or gold-dust taken or extracted, mined or received from the said placer mining claims, before the said sum of twenty-four thousand dollars (\$24,000.00) or any other amount is payable to the said defendants, Jack Lesamis or Andy Garbin.

X.

That owing to the acts and actions of the said defendants, Jack Lesamis and Andy Garbin, as above

alleged, it [10] is impossible for the plaintiff and said defendants to further act and conduct the mining copartnership in the management and working of said mining copartnership property and mining claims; that said defendants, George Stanley, Sam Salo, Andy Garbin, Jack Lesamis and John Tyapay, are all insolvent and have no other property of value other than their alleged interest in the said copartnership mining property, and unless the Court appoint a receiver of this court to take possession of the said mining copartnership property and mining claims and collect the royalties, rents and profits thereof, the same will be wholly dissipated by the said defendants, and the plaintiff will be compelled by law to pay the indebtedness of said mining copartnership from his personal assets; that the said defendants, Jack Lesamis, Andy Garbin and Jack Tyapay refused to account to the plaintiff and have refused and still refuse to enter into an accounting between the plaintiff and the said defendants, with reference to the expenses and output of the said copartnership under the terms and conditions of said copartnership agreement, and said defendants, Stanley and Salo, threaten to assume the management and control of the copartnership assets of said KLERY CREEK MINING COMPANY, and threaten to appropriate the rents, royalties and profits to their own use and benefit, and threaten to and do ignore the debts and liabilities of said KLERY CREEK MINING COMPANY, to the damage and injury of the plaintiff.

WHEREFORE, plaintiff prays the Court as follows:

1. For a restraining order against the defendants and each of them enjoining and restraining them and each of them *pendente lite* from in any manner transferring, assigning, encumbering or conveying in any manner or way, whatsoever, any [11] interest in the said mining claims above alleged, the property of the said KLERY CREEK MINING COMPANY.

2. That the Court appoint a receiver of this Court to take possession of said mining claims and hold the possession, subject, however, to the leases heretofore given for the purpose of accepting and receiving, subject to the orders of the Court, all rents, royalties and profits from the operation of the mining claims of the said KLERY CREEK MINING COMPANY.

3. That the Court make an accounting between the plaintiff and defendants of all and every matter arising under and by virtue of the said mining copartnership, and that the Court order and direct the said receiver to pay and defray from the rents, royalties and profits collected by him, any and all indebtedness now existing against the said KLERY CREEK MINING COMPANY, including the amount due to the said Robinson, Magids & Co., or their said assignee, Philip Murphy.

4. That the Court enter a final decree dissolving the said copartnership and directing a sale of all of said property, both real and personal, and directing a distribution of the proceeds among the mem-

bers of the said copartnership if any proceeds exist after the satisfaction of all indebtedness found to be due.

5. That the plaintiff be decreed and adjudged entitled to his costs and disbursements in this action against the said defendants.

6. And that the plaintiff be entitled to such other and further relief as to the Court seems meet and proper.

J. F. HOBBS and
WILLIAM A. GILMORE,
Attorneys for Plaintiff. [12]

United States of America,
District of Alaska,—ss.

H. Greenberg, being first duly sworn, deposes and says:

That he is the plaintiff in the above and foregoing action; that he has heard read the above and foregoing complaint, knows the contents thereof and the same is true as he verily believes.

H. GREENBERG.

Subscribed and sworn to before me this 30th day of October, A. D. 1911.

[Notarial Seal]

WILLIAM A. GILMORE,
Notary Public in and for the District of Alaska.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Complaint. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome.

Nov. 1, 1911. John Sundback, Clerk. By _____
Deputy. L. J. H. Hobbes, and William A. Gil-
more, Attorneys at Law, Nome, Alaska, Attorneys
for Plaintiff. [13]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GAR-
BIN, GEORGE STANLEY and SAM
SALLO,

Defendants.

Separate Answer of George Stanley and Sam Sallo.

Come now the defendants George Stanley and Sam Sallo, and for their separate answer to the complaint of the plaintiff, H. Greenberg, herein, admit, deny and allege as follows:

I.

These answering defendants deny each and every allegation, matter and thing in said complaint alleged, except as hereinafter admitted, qualified or otherwise alleged.

II.

These answering defendants admit that on the 19th day of March, 1910, their codefendants herein, Jack Lesamis, John Tyapay and Andy Garbin, were the owners of the premises mentioned and described in the said complaint, and that on the day last afore-

said, their said codefendants entered into the agreement and made the conveyance in words and figures set forth in said complaint and upon the considerations expressed in said instruments. [14]

III.

That on or about the 2d day of Sept. 1911, the defendant Andy Garbin for a valuable consideration, granted, bargained, sold and conveyed and assigned to the defendant George Stanley, all his right, title and interest in and to the said premises described in said complaint, and in and to all gold-dust extracted therefrom, and in and to all claims and demands against the plaintiff Greenberg, arising from the operation and mining of said premises, and in and to all deferred payments due from said Greenberg on account of his purchase of the undivided one-fourth of said premises under the conveyance mentioned in the complaint, and in and to all sums or royalties due or to become due under leases executed by said Garbin and cotenants of said premises.

IV.

That on the day last aforesaid, the defendant Jack Lesamis, for a valuable consideration, granted, bargained, sold and conveyed and assigned to the defendant Sam Sallo, all his right, title and interest in and to the said premises described in said complaint, and in and to all gold-dust extracted therefrom, and in and to all claims and demands against the plaintiff Greenberg, arising from the operation and mining of said premises, and in and to all deferred payments due from said Greenberg on account of his purchase of the undivided one-fourth of said

premises under the conveyance mentioned in the complaint, and in and to all sums or royalties due or to become due under leases executed by said Lesamis and cotenants of said premises.

V.

That under the said agreement, the said plaintiff [15] and the defendants Tyapay, Garbin and Lesamis, as copartners under the firm name of KLERY CREEK MINING COMPANY, mined and operated No. 1 Above the Star Association claim mentioned in the complaint; that the plaintiff, as copartner aforesaid, received the total receipts of said business, being gold-dust extracted from said claim, amounting in all to the sum of \$16,343.43, and paid all the expenses of said business amounting in all to the sum of \$7,788.62, leaving a balance due from said Greenberg to each of the defendants Garbin and Lesamis of the sum of \$2,138.70.

That by virtue of said conveyance and agreement mentioned in the complaint, the said plaintiff became and was indebted to each of the defendants Garbin and Lesamis, in a sum equal to one-third of one-fourth of the said gold-dust extracted, to wit, the sum of \$1,361.70, to apply on the purchase money agreed to be paid by said plaintiff under the said conveyance to him.

VI.

That on or about the 9th day of September, 1910, the said copartnership was terminated and the books of said partnership closed.

VII.

That said plaintiff has not paid to the said Garbin

and Lesamis the said amounts so due as aforesaid, except the sum of \$1,333.00 thereof, paid to said Garbin, and except the sum of \$1,000.00 thereof paid to said Jack Lesamis.

VIII.

That thereafter, and during the year 1911, the said plaintiff, on his own account and as tenant in common of said premises, operated and mined the said No. 1 Above the Star [16] Association Claim, and extracted from said claim gold-dust of the amount and value of \$8,713.38; that under and by virtue of said agreement and conveyance mentioned in the complaint the said plaintiff became indebted to the said Garbin and Lesamis, and to each of them, in the sum of \$726.12, the same being their share of the one-fourth of the gold-dust extracted from said claim, to be applied on said purchase price to be paid by said plaintiff as hereinbefore mentioned.

IX.

That said several amounts so due from said plaintiff to said Garbin and Lesamis were the amounts assigned to these answering defendants, as hereinbefore stated, and said amounts are now due and owing to these answering defendants, to wit, in the aggregate to said George Stanley the sum of \$2,893.78, with interest on the sum of \$2,167.66 thereof from September 9th, 1910, at the rate of eight per cent per annum, and with interest on \$726.12 thereof from August 10, 1911, at the rate of eight per cent per annum, and in the aggregate to Sam Sallo, the sum of \$3,226.77, with interest on \$2,500.65 thereof from September 9th, 1910, at the

rate of eight per cent per annum, and with interest on \$726.12 thereof from the 10th day of August, 1911, at the rate of eight per cent per annum.

X.

That the plaintiff and the Robertson, Magids Company, Robertson-Magids and Company, and Phillip Murphey had notice and knowledge at all times of the matters and things herein alleged; and with such knowledge participated in and entered into the transactions mentioned in the complaint; conniving [17] and conspiring with the plaintiff with the fraudulent intent and design thereby to deprive and defraud these answering defendants and their predecessors in interest of their said properties.

WHEREFORE these answering defendants pray that judgment may be entered in their favor and against the plaintiff for the respective sums due them and each of them, as aforesaid, with interest; that if any accounting be necessary for such purpose, that an accounting be had of all the matters and things in issue between said parties, and that upon such accounting being had, judgment be entered in favor of each of said parties for such sums or sum as such parties shall be entitled to, and against the other of said parties, according to the amounts due from each, and for costs to be taxed to the prevailing parties herein, and for such other and further relief as to the Court shall seem just.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Defendants. [18]

District of Alaska,
Nome Precinct,—ss.

George Stanley, being first duly sworn, deposes and says: That he is one of the defendants named in the foregoing answer, that he has read the same, knows the contents thereof, and that the same is true as he verily believes.

GEO. L. STANLEY.

Subscribed and sworn to before me this the 19th day of December, 1911.

[Notarial Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

Service of a copy of the foregoing Answer this 19th day of Dec. 1911, at — M., admitted.

WILLIAM A. GILMORE,

Of Attorneys for Plff.

[Endorsed]: #2349. *No. 2349.* In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Answer of Stanley & Sallo. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Dec. 20, 1911. John Sundback, Clerk. By ——— Deputy. L. O. D. Cochran and G. J. Lomen, Attorneys for Defendants.
[18½]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GAR-
BIN, GEORGE STANLEY and SAM
SALO

Defendants.

**Separate Answer of Jack Lesamis, John Tyapay and
Andy Garbin.**

Come now the defendants Jack Lesamis, John Tyapay, and Andy Garbin, and for their separate answer to the complaint of the plaintiff in the above-entitled action, deny, admit and allege as follows:

I.

Except as hereinafter admitted or qualified, they deny each and every allegation, matter and thing in said complaint contained.

II.

They admit that on the 19th day of March, 1910, they were the owners of the premises mentioned and described in the complaint and that on said day they entered into the agreement and made the conveyances in said complaint in words and figures set forth, and that the consideration [19] paid and to be paid by the plaintiff for and on account of said agreement and conveyance were the considerations mentioned in said instruments and none other; that it

was then and there understood and agreed that the provisions in said agreement mentioned were to be furnished by said plaintiff free and without cost to said defendants, and that the deferred payment of twenty-four thousand dollars mentioned in the said conveyance was to be paid of the first money taken out of the ground, meaning and intending thereby that the first gold-dust extracted from the premises conveyed, to wit, the undivided one-quarter of the mining claims and property mentioned in said conveyance, was to be applied in payment of said twenty-four thousand dollars; in other words, one-quarter of the gross output of said mining claims mentioned in the complaint were to be so applied.

III.

The said defendants admit that the plaintiff paid the six thousand dollars in said agreement and conveyance mentioned, and furnished provisions under said agreement, but defendants allege that said plaintiff, in violation of said agreement, charged up against these answering defendants certain of said groceries so furnished, to the extent and aggregate amount of \$933.13.

IV.

Said defendants admit that under and pursuant to said agreement, they and the said plaintiff became and were mining copartners under the name and style of "KLERY CREEK MINING COMPANY," and during the summer and fall of 1910, they operated as such copartners, one of the claims mentioned in [20] said conveyance, to wit, No. 1 Above the Star Association Claim on Klery Creek.

V.

That the partnership above-mentioned was for an indefinite term and terminable at the will of any of said partners, and the same was, at the close of the mining season, to wit, the 9th day of September, 1910, in fact dissolved by mutual consent, and upon notice of the dissolution thereof given by these answering defendants to said plaintiff.

VI.

That a partial accounting and settlement of said partnership accounts was then and there had, and the books of said partnership then and there closed; that the total receipts of said partnership consisted of the gold-dust extracted from said No. 1 Above the Star Association Claim, and amounted in the aggregate of \$16,343.43, and that the total expenses of said partnership were in the aggregate \$7,788.62, leaving a balance of net profits of \$8,557.31, and leaving due each of said partners the sum of \$2,138.70; that under said agreement and conveyance set forth in the complaint, these defendants were, in addition to said net profits, entitled to receive from said plaintiff to be equally divided between them, these answering defendants, one-fourth of said gross receipts above mentioned, to wit, \$4,085.85, and to each of these answering defendants the sum of \$1,361.70.

That said plaintiff received all of said gold-dust, except gold-dust amounting to the value of \$720.00, which last gold-dust was received by one Martin F. Moran, who is still indebted to said partnership therefor. That said plaintiff paid [21] all the expenses of said partnership incurred in said mining

operations, and paid to these answering defendants the further sums, namely: To John Tyapay, \$1,666.00; to Jack Lesamis, \$1,000.00, and to Andy Garbin, \$1,333.00, and no more, leaving the following balance due from said plaintiff to each of these defendants, on account of said partnership transactions and on account of said one-quarter of the gross output of said mining operations, the latter to be applied in reduction of said indebtedness of twenty-four thousand dollars, as follows:

To John Tyapay, the sum of \$1,688.90; to Jack Lesamis and his assign, Sam Sallo, \$2,500.65, and to Andy Garbin and his assign, George Stanley, \$2,167.66.

VII.

That on or about the 2d day of Sept., 1911, the defendant Andy Garbin, for a valuable consideration, conveyed to George Stanley, his interest in said mining claims and property, including his interest in said bal. of net profits and in said twenty-four thousand dollars due from said plaintiff, and his interest in the royalties under the leases hereinafter mentioned; that the defendant Jack Lesamis on the same day, for a valuable consideration, conveyed to Sam Sallo his interest in said claims and property, including his interest in said balance of net profits and in said twenty-four thousand dollars due from said plaintiff, and his interest in royalties under the leases hereinafter mentioned; that said conveyances were made in good faith without any fraud or collusion whatever.

VIII.

That the said Stanley and Sallo, by reason of the said [22] conveyances and assignments to them made as aforesaid, are now entitled to have and receive from the said plaintiff the said moneys so assigned to them as aforesaid, and that said defendant Tyapay is entitled to the said balance due him as above specified.

IX.

That during the year 1911, the plaintiff, as a tenant in common with these answering defendants, and on his own account, mined and operated said No. 1 Above the Star Association Claim on Klery Creek, and extracted from said claim and converted to his own use gold-dust of the amount and value of \$8,713.38; that if said gold-dust was extracted and said mining done at a loss to said plaintiff, such loss did not, as the defendants are informed and believe, exceed the sum of \$15,861.61; that under said agreement and conveyance mentioned in the complaint, the plaintiff became and is now indebted to these defendants and their assigns Stanley and Sallo, above mentioned, in a sum equal to one-fourth of all of said gold-dust so extracted, to wit, in the sum of \$2,178.35, that is to say to said Tyapay, \$726.12; to said Stanley, \$726.12, and to said Sallo, \$726.12.

X.

That these answering defendants are the owners of the Star Association placer mining claim in the Noatak-Kobuk Recording District, District of Alaska, and that as such owners they are entitled to certain gold-dust extracted from said claim, to wit,

891½ Oz. 31½ Dwt. of gold-dust, of the value \$1,629.94; that said plaintiff, on or about the 1st day of September, 1911, took possession of said gold-dust without authority or consideration therefor, and converted the same [23] to his own use, to the damage of these answering defendants in the sum of \$1,629.94; that by reason of the premises the plaintiff is now indebted to these answering defendants and their assigns Stanley and Sallo, in the sum of \$8,955.50, with interest on \$5,639.71 thereof from the 9th day of September, 1910, at the rate of eight per cent per annum, and with interest on the sum of \$2,178.35 thereof from the 10th day of August, 1911, at the rate of eight per cent per annum; and on \$1629.94 thereof from September 1st, 1911, at the rate of eight per cent per annum.

XI.

These answering defendants admit that on or about the 24th day of October, 1911, one Phillip Murphey, claiming to be the assignee of Robertson, Magids Company, and Robertson, Magids & Company, of certain accounts of the alleged aggregate amount of \$17,124.00, began an action at law against these answering defendants, and the plaintiff herein to recover said amount with interest and costs and sued out a Writ of Attachment in said action; that said attachment has been levied upon certain of the properties mentioned in the complaint and in the conveyances above mentioned, but the defendants allege that the accounts so assigned to said Phillip Murphey and so sued upon as aforesaid were the accounts incurred by the plaintiff Greenberg, in his mining

operations during the year 1911 above mentioned, and were for expenses in said mining operations; that said accounts and expenses were caused, by said plaintiff, to be fraudulently charged against the Klery Creek Mining Company above mentioned, and were fraudulently caused to be assigned to said Phillip Murphey, and said action was collusively and fraudulently [24] caused by said plaintiff to be instituted and said attachment to be levied with the fraudulent intent and purpose on the part of said plaintiff of cheating and defrauding these defendants of their said properties. That with full knowledge on the part of said Robertson, Magids Company and Robertson, Magids & Company and said Phillip Murphey, of the rights and interests of the defendants herein, and of the said fraudulent intent and purpose on part of said plaintiff, the said Robertson, Magids Company, the said Robertson, Magids & Company, and the said Phillip Murphey aided, connived and conspired with said plaintiff in said fraudulent acts, purposes and intent aforesaid.

That plaintiff is a merchant and operator of large means, owning many mercantile concerns and branch stores in various places in Alaska, and is the president and a principal stockholder of the Robertson, Magids Company and the principal member of said Robertson, Magids and Company, and that said Phillip Murphey is one of his agents and employees in said businesses, and is the agent and attorney in fact of said plaintiff, and as such attorney in fact authorized to transact all manner of business for and on behalf of said plaintiff.

That said plaintiff, as a tenant in common of the said defendants herein, and not otherwise, during the year 1911, operated and mined upon that certain mining claim known as No. 1 Above the Star Association claim; that said operation and mining was fraudulently conducted by said plaintiff, in the name of the Klery Creek Mining Company, when in fact, as the plaintiff, the said Robertson, Magids Company, the said Robertson, Magids and Company and said Phillip Murphey then and there and at all times well knew, said mining was done and said claim was operated by and for the sole use and benefit of the [25] plaintiff, except in so far as the said plaintiff was liable to account to his cotenants for their share of the net profits of said mining and operation, if any.

That plaintiff fraudulently caused to be charged against said Klery Creek Mining Company the expenses of said mining and operation during the year 1911, including the items embraced within the accounts assigned to said Phillip Murphey, above mentioned being accounts assigned to said Murphey mentioned in the Complaint.

That said plaintiff fraudulently caused said accounts, without consideration paid therefor, as defendants are informed and believe, to be assigned to said Murphey, and thereafter caused said action to be brought and said attachment to be issued and levied as aforesaid.

That the plaintiff herein is, as defendants are informed and believe, the real party in interest in said action so instituted by said Phillip Murphey. That

said Murphey received and now holds the assigned accounts mentioned, upon and under a secret and fraudulent trust for the use and benefit of the plaintiff Greenberg, and under such trust prosecutes said action and attachment as a part of the said scheme of the said plaintiff to defraud the defendants herein of their said mining claims and property.

XII.

These defendants further allege that the only indebtedness of the Klery Creek Mining Company is a small account in favor of S. B. Marshal and Kayhill in the sum of \$2.50, and that these defendants are abundantly able to pay the same.

That the assets of said partnership, the Klery Creek [26] Mining Company, is the indebtedness of said plaintiff Greenberg to the defendants herein and an account of \$720.00 due from Martin F. Moran.

XIII.

These answering defendants admit that on August 10th, 1911, certain leases of a number of said mining claims belonging to said plaintiff and these answering defendants were made and executed; but these defendants allege that said leases were executed by said owners as tenants in common of said mining claims, and not by the Klery Creek Mining Co.

WHEREFORE these defendants pray that an accounting be had between said parties and that in such accounting an account be also made of the amounts due from said plaintiff to the defendants on account of moneys due under said purchase money contract above mentioned, and of all other matters and things growing out of said partnership or matters

connected therewith, and that judgment be entered in favor of the parties thereto entitled for such amounts as may be due from the parties each to the other, and for their costs and disbursements herein, and for such other and further relief as to the Court shall seem just.

O. D. COCHRAN,
G. J. LOMEN,

Attorneys for Defendants. [27]

District of Alaska,
Nome Precinct,—ss.

Andy Garbin, being first duly sworn, deposes and says:

That he is one of the defendants named in the foregoing answer, that he has read the same, knows the contents thereof, and that the same is true as he verily believes.

ANDY GARBIN.

Subscribed and sworn to before me this the 19th day of December, 1911.

[Notarial Seal] G. J. LOMEN,
Notary Public in and for the District of Alaska.

Service of a copy of the foregoing Answer this 19th day of Dec. 1911, at — M., admitted.

WILLIAM A. GILMORE,
Of Attorneys for Plff.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Answer of Garbin, Tyapay & Lesamis. Filed in the Office of the Clerk of the District Court

of Alaska, Second Division, at Nome. Dec. 20, 1911.
John Sundback, Clerk. By —————, Deputy. L.
O. D. Cochran, G. J. Lomen, Attorneys for Defendants,
Nome, Alaska. [28]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GAR-
BIN, GEORGE STANLEY and SAM SALO,
Defendants.

**Reply to Separate Answer of Jack Lesamis, John
Tyapay and Andy Garbin.**

Comes now the plaintiff and for reply to the
separate answer of Jack Lesamis, John Tyapay and
Andy Garbin, admits, denies and alleges as follows:

I.

Replying to paragraph II of said answer, plaintiff denies the affirmative allegations thereof, and specifically denies that it was ever the meaning or intention of the agreement mentioned in said paragraph, as stated in said paragraph, or any other meaning or intention than that stated in plaintiff's complaint.

II.

Replying to paragraph III of said answer, plaintiff denies that he charged up against the said defend-

ants certain groceries to the extent and amount of nine hundred thirty-three dollars and thirteen cents (\$933.13), in violation of the said agreement, or at all. [29]

III.

Replying to paragraph V of said answer, plaintiff denies that the said partnership was terminable at the will of any of said partners, or that said partnership was, on the 9th day of September, 1910, dissolved by mutual consent, or otherwise, or at all.

IV.

Answering paragraph VI of said answer, plaintiff denies that any partial account or settlement of said partnership accounts was on said 9th day of September, 1910, made or attempted to be made, or that the books of said partnership were then and there closed or attempted to be closed; and said plaintiff further denies all of the material affirmative allegations of said paragraph, and the whole thereof, except that he admits that one Martin F. Moran is still indebted to said partnership for gold received and that the plaintiff in the fall of 1910, paid to the defendant John Tyapay sixteen hundred and sixty-six dollars (\$1666.00) and to the defendant Jack Lesamis the sum of one thousand dollars (\$1,000.00) and to the defendant Andy Garbin the sum of thirteen hundred and thirty-three dollars (\$1333.00), which said sums were paid from the profits of the mining operations of said copartnership for the year 1910, and which were paid and intended to be paid to said defendants and each of them to apply on the said balance payment of twenty-four thousand dol-

lars (\$24,000.00) mentioned in said partnership agreement described in plaintiff's complaint.

And plaintiff particularly denies that at said time [30] or any other time there was a balance due to any of the said defendants from the gross output or net output of the operations of any of said partnership property in the sum mentioned in said paragraph or in any sums, or at all.

V.

Replying to paragraph VII of said answer, plaintiff denies that the said Andy Garbin for a valuable consideration conveyed his interest in said mining claims and property to the defendant George Stanley, or that he made the assignment alleged therein to the said Stanley for a valuable consideration; or that the said defendant Jack Lesamis on said date, or at any time, for a valuable consideration conveyed his interests in said partnership to the defendant Sam Salo or made the assignments therein alleged to the said Sam Salo for a valid consideration; and plaintiff alleges that said conveyances and assignments were made as alleged in plaintiff's complaint.

VI.

Replying to paragraph VIII of said answer, plaintiff denies that the said defendants Stanley and Salo are now or at any time have been entitled to receive from the plaintiff, or from the said partnership, any of said partnership property or moneys due thereunder.

VII.

Replying to paragraph IX of said answer, plaintiff denies each and every allegation, matter and

thing therein contained and the whole thereof, and particularly denies that he [31] is indebted to the defendants in any sum or sums whatsoever.

VIII.

Replying to paragraph X of said answer, plaintiff denies each and every allegation, matter and thing therein contained and the whole thereof, and particularly denies that he is indebted to the defendants in the sums therein named, or in any other sums whatsoever.

IX.

Replying to paragraph XI of said answer, plaintiff denies that the said accounts assigned to one Philip Murphy, mentioned in said paragraph, were fraudulently charged against the said Klery Creek Mining Company, or fraudulently assigned to said Philip Murphy, or that said action was collusively or fraudulently caused to be instituted, or that said action was brought for the purpose of cheating or defrauding the defendants, or that the said Robinson-Magids & Co., and the said Philip Murphy ever aided, connived and conspired in any way as alleged in said paragraph.

Plaintiff admits that he is one of the copartners of the firm of Robinson, Magids & Co., and that said Philip Murphy is one of the agents and employees of said company, and the agent and attorney in fact of the plaintiff.

Plaintiff denies that during the year 1911, the plaintiff, as a tenant in common with the said defendants, operated and mined on that certain placer mining claim known as No. 1 Above Star Associa-

tion claim, or that said operations and mining was fraudulently conducted by the plaintiff in the name of the Klery Creek Mining Company. [32]

Plaintiff denies that he ever fraudulently caused to be charged against said Klery Creek Mining Company the expenses of said operations, but alleges that all of the expenses of the operations conducted during the said year 1911 on said ground was the expense and cost of said Klery Creek Mining Company as alleged in said complaint.

Plaintiff denies that he fraudulently caused said accounts to be assigned to the said Philip Murphy, but alleges that said assignment was made in good faith by said Robinson, Magids & Co., for the purpose of collection.

And plaintiff further denies that the said Murphy now holds the said assigned accounts now sued upon under any agreed or fraudulent trust for the use and benefit of the plaintiff, Greenberg, or at all, but plaintiff alleges that said suit was brought in good faith for the purpose of collecting said accounts, which are justly and legally due to the said Robinson, Magids & Co.

X.

Replying to paragraph XII of said answer, plaintiff denies each and every allegation, matter and thing therein contained.

XI.

Replying to paragraph XIII of said answer, plaintiff denies that the leases mentioned in said paragraph were ever executed by the defendants as ten-

ants in common or otherwise, or in any other manner than as members of the Klery Creek Mining Company. [33]

WHEREFORE, plaintiff having fully replied to the answer of the defendants, prays for the relief demanded in his complaint.

WILLIAM A. GILMORE and
J. F. HOBBS,

Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

H. Greenberg, being first duly sworn, deposes and says:

That he has heard read the above and foregoing reply, knows the contents thereof and the same is true as he verily believes.

H. GREENBERG.

Subscribed and sworn to before me this 8th day of August, A. D. 1913.

[Notarial Seal]

L. W. HAYDEN,

Notary Public in and for the District of Alaska.

My commission expires October 13, 1913.

Service of the above and foregoing reply admitted by receipt of copy, this 8 day of August, 1913.

G. J. LOMEN,

Of Attorneys for Defendants.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Reply to Separate Answer of Jack Lesamis, John Tyapay and Andy Garbin. Filed in the Office

of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 8, 1913. John Sundback, Clerk. By ———, Deputy. William A. Gilmore, Attorney at Law, Nome, Alaska, Attorney for Plaintiff. [34]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,
GEORGE STANLEY and SAM SALLO,
Defendants.

**Reply to Separate Answer of George Stanley and
Sam Sallo.**

Comes now the plaintiff and for reply to the separate answer of defendants George Stanley and Sam Sallo, admits, denies and alleges as follows:

I.

Replying to paragraph III of said answer, plaintiff denies that the conveyances and assignments mentioned and described in said paragraph were ever made for a valuable consideration or any consideration whatever.

II.

Replying to paragraph IV of said answer, plaintiff denies that the conveyances and assignments mentioned and described in said paragraph IV were

ever made for any valuable consideration, or any consideration at all.

III.

Replying to paragraph V of said answer, plaintiff [35] denies each and every allegation, matter and thing therein contained and the whole thereof, and particularly denies that the plaintiff is indebted to defendants in the sum or sums mentioned in said paragraph, or in any sum or sums whatsoever.

IV.

Replying to paragraph VI of said answer, plaintiff denies that on the 9th day of September, 1910, or any other time, said copartnership was terminated or that the books of said partnership were closed.

V.

Replying to paragraph VII of said answer, plaintiff admits that he paid the sums mentioned therein to Garbin and Lesamis, but denies each and every other allegation, matter and thing therein contained.

VI.

Replying to paragraph VIII of said answer, plaintiff denies each and every allegation, matter and thing therein contained and the whole thereof.

VII.

Replying to paragraph IX of said answer, plaintiff denies each and every allegation, matter and thing therein contained, and the whole thereof, and particularly denies that he is indebted to the defendants in the sum or sums mentioned in said paragraph, or in any other sum or sums whatsoever.

VIII.

Replying to paragraph X of said answer, plaintiff [36] denies each and every allegation, matter and thing therein contained and the whole thereof.

WHEREFORE, plaintiff having fully replied to the answer of the said defendants, Stanley and Sallo, prays for the relief demanded in his complaint.

WILLIAM A. GILMORE and
J. F. HOBBS,

Attorneys for Plaintiff.

United States of America,
District of Alaska,—ss.

H. Greenberg, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action; that he has heard read the above and foregoing reply, knows the contents thereof and the same is true as he verily believes.

H. GREENBERG.

Subscribed and sworn to before me this 8th day of August, A. D. 1913.

[Notarial Seal]

L. W. HAYDEN,

Notary Public in and for the District of Alaska.

My commission expires Oct. 13, 1913.

Service of the above and foregoing reply acknowledged by receipt of copy this 8th day of August, 1913.

G. J. LOMEN,

Of Attorneys for Defendants.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Green-

berg, Plaintiff, vs. Jack Lesamis et al., Defendants. Reply to Separate Answer of George Stanley and Sam Sallo. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 8, 1913. John Sundback, Clerk. By _____, Deputy. William A. Gilmore, Attorney at Law, Nome, Alaska, Attorney for Plaintiff. [37]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,
GEORGE STANLEY and SAM
SALLO,

Defendants.

Supplemental Answer and Cross-complaint.

Come now the defendants George Stanley and Sam Sallo, and for their supplemental answer and for a cross-complaint herein, allege:

I.

That said action was commenced in this court on the 1st day of November, 1911, by the filing of the complaint with the clerk of said court, and the issuing of a summons thereon.

That on the 20th day of December, 1911, the defendants above named filed their answer, in said action, the said defendants Stanley and Sallo filing a joint answer.

That said action is brought for the dissolution of an alleged mining copartnership, and for an accounting.

II.

That since the commencement of said action and the joining of issue therein, the plaintiff has neglected and refrained from mining or operating the mining claims mentioned in the complaint, and from extracting gold therefrom, or from [38] any or any part of said claims, and has neglected and refused to pay to the defendants the sum of twenty-four thousand dollars (\$24,000.00), the balance of the purchase price agreed by him to be paid according to the terms of the contract and conveyance set forth in the complaint herein.

III.

That it was understood and agreed by the plaintiff and the defendants, parties to the contract and deed of conveyance mentioned in the Complaint, and it was contemplated in and by said contract and conveyance, that the plaintiff should and would, with reasonable diligence, operate and mine the premises described in the Complaint and extract gold therefrom; and that out of the first money taken out of the ground purchased, to wit, the undivided one-fourth ($\frac{1}{4}$) of said premises, and meaning and intending the first or gross amount of gold-dust extracted therefrom, he, the said plaintiff, would and should pay to the grantors in said conveyance the said sum of twenty-four thousand dollars (\$24,000.00).

And it was further understood and agreed by and between the parties to the said contract and convey-

ance mentioned in the Complaint, that said twenty-four thousand dollars should and would be paid within a reasonable time; that more than a reasonable time has long since elapsed.

IV.

That since issue joined in said action a part of said claims have been mined by third persons under leases given by plaintiff and defendants, on a royalty basis; that the plaintiff has collected and received from said lessees one half ($\frac{1}{2}$) of said royalties amounting to the sum of [39] twelve hundred and twenty-six and $\frac{38}{100}$ dollars, but that plaintiff has neglected and refused to pay said royalties so received by him, or any part thereof, in liquidation of said twenty-four thousand dollars, or any part thereof, and has neglected and refused to account to the said defendants or any of them, for the royalties so received, or any part thereof.

V.

That during the years 1911, 1912 and in each of said years, the defendants Stanley and Sallo duly performed the assessment work on each of the following claims mentioned in the Complaint, to wit:

“1 and 2 Above Discovery on Bear Creek; The Rich Association on Bear Creek; the Central Association, 1 Below and 1 and 2 Above on Central Creek; Discovery Claim on Jack Creek and Rocky Association Rock Creek; in 1912 also on the No. 6 Below on Klery Creek and California Association; and in 1913 also on the No. 2 Above on Klery Creek; said Rocky Association, Discovery on Jack Creek and Fraction be-

tween Discovery and Star Association; said assessment work being of the value of, and aggregating in all the sum of Twenty-four hundred dollars (\$2400.00).”

That said plaintiff has neglected and refused to pay or contribute his proportion of said assessment work, to wit, one-half ($\frac{1}{2}$) thereof, to wit, one thousand two hundred dollars, (\$1,200.00) or any part thereof.

IV.

That on or about the 13th day of August, 1911, the defendant Andy Garbin, for valuable consideration, conveyed to the defendant Stanley, his interest in the premises described in the complaint, and assigned to said Stanley, his interest in the profits of said premises and in said twenty-four thousand dollars due from said plaintiff, and his interest in all royalties due under the leases above mentioned; and that on the same day defendant Jack Lesamis, for a valuable consideration, conveyed to the defendant Sallo, his interest [40] in said premises and assigned his interest in the profits of said premises and in said twenty-four thousand dollars due from said plaintiff, and his interest in all royalties under the leases above mentioned.

VII.

That by reason of the premises there is now due and owing from plaintiff to the defendants Stanley and Sallo, on account of the said purchase money agreed to be paid by plaintiff for said undivided one-fourth ($\frac{1}{4}$) of said premises, two-thirds of the sum of twenty-four thousand dollars (\$24,000.00), to wit,

\$18,000.00. That there is due from said plaintiff to said defendants Stanley and Sallo on account of assessment work performed by them above mentioned the sum of one thousand two hundred dollars.

WHEREFORE, defendants Stanley and Sallo pray that they have and recover judgment against plaintiff H. Greenberg for the sum of nineteen thousand and two hundred dollars, in addition to all money due them from said plaintiff on the accounting to be had in this action, and for such other and further relief as to the Court may seem just and proper, and for their costs and disbursements herein.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Defendants Stanley and Sallo. [41]

United States of America,

District of Alaska,—ss.

Geo. Stanley, being first duly sworn, deposes and says: That he is one of the defendants named in the foregoing supplemental answer and cross-complaint; that he has read the same, knows the contents thereof, and that the same is true as he verily believes.

GEO. L. STANLEY.

Subscribed and sworn to before me this the 8th day of August, 1913.

[Notarial Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

My Comm. expires June 27, 1917.

Service of the within supplemental answer and cross-complaint of defendants Stanley and Sallo is

hereby admitted at Nome, Alaska, Aug. 12, 1913.

WILLIAM A. GILMORE,
Of Attys. for Plaintiff.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Supplemental Answer and Cross-complaint. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 12, 1913. John Sundback, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Defendants. [42]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,
GEORGE STANLEY and SAM
SALLO,

Defendants.

**Reply and Answer to Supplemental Answer and
Cross-complaint of Defendants George Stanley
and Sam Sallo.**

Comes now the plaintiff H. Greenberg, and for reply and answer to the supplemental answer and cross-complaint of defendants George Stanley and

Sam Sallo, admits, denies and alleges as follows:

I.

He admits the allegations of paragraph I thereof.

II.

Answering paragraph II thereof plaintiff denies each and every allegation, matter and thing therein contained, and the whole thereof, except as hereinafter alleged.

III.

Answering paragraph III thereof, plaintiff denies, each and every allegation, matter and thing therein contained, and the whole thereof. [43]

IV.

Answering paragraph IV thereof, plaintiff denies each and every allegation, matter and thing therein contained and the whole thereof, except that he admits that certain leases were given to third parties on the Klery Creek Mining Company's mining property, and that the plaintiff received a small amount of gold-dust as royalty thereof, which said royalty was applied by the plaintiff in the discharge and payment of the Klery Creek Mining Company's partnership indebtedness.

V.

Answering paragraph V thereof, plaintiff alleges that he has no knowledge or information of the facts therein stated, as to whether or not the defendants Stanley and Sallo did or did not perform the alleged work therein mentioned, and therefore deny the same.

And plaintiff further alleges in answer thereto,

that if said Stanley and Sallo did perform the assessment work mentioned therein, that the same was done at the instance and request of the defendants Lesamis and Garbin who were and are members of the Klery Creek Mining Company, owner of said placer claims.

VI.

Answering paragraph VI plaintiff denies each and every allegation, matter and thing therein contained, and the whole thereof, save and except that the defendants Andy Garbin and Jack Lesamis pretended to transfer certain interests in real and personal property of the Klery Creek Mining Company to the defendants Stanley and Sallo, but that the same was done without any consideration whatever.

[44]

VII.

Answering paragraph VII thereof, plaintiff denies each and every allegation, matter and thing therein contained, and the whole thereof, and particularly denies that there is now due and owing from the plaintiff to the defendants Stanley and Sallo the sums mentioned in said paragraph or any sum or sums whatsoever.

And for an affirmative reply and answer to the supplemental answer and cross-complaint of defendants George Stanley and Sam Sallo, plaintiff alleges as follows:

I.

That at all times since the 19th day of March, 1910, it was the intention and meaning of the Klery Creek Mining Company, as expressed in the written con-

tract of partnership set forth in plaintiff's complaint in this action, that the plaintiff and the defendants Andy Garbin, Jack Lesamis and John Tyapay, jointly as copartners and not otherwise, should mine and operate the placer claims belonging to said Klery Creek Mining Company described in the plaintiff's complaint, and after deducting the expenses of operations from the gross output, from the first profits pay to the said Garbin, Lesamis and Tyapay the said sum of twenty-four thousand dollars (\$24,000.00) and not otherwise.

II.

That on or about the —— day of September, 1911, the said defendants Garbin and Lesamis refused to further comply with the terms of the said agreement of copartnership, [45] and refused to further mine and operate said claims or assist the plaintiff as a copartner in operating the same, and at all times since said time have contended and claimed that the said copartnership was dissolved.

III.

That for and because of said refusal of said defendants Garbin and Lesamis to further mine and operate said placer claims as copartners under the terms of said agreement, plaintiff instigated this action for an accounting and dissolution of said copartnership, and the same has been pending trial ever since. That the said defendants George Stanley and Sam Sallo were not parties to the said partnership agreement and were not interested in any way in the formation of said Klery Creek Mining Company, and plaintiff has never at any time recognized the

said defendants Stanley and Sallo as copartners in said Klery Creek Mining Company, and does not now recognize them as copartners, but still contends and claims that the said defendants Lesamis, Garbin and Tyapay are members of said copartnership and that the plaintiff is entitled to an accounting between himself and said defendants Lesamis and Garbin and Tyapay, under the original terms and conditions of said copartnership agreement, and is also entitled to all other relief prayed for in his original complaint against said defendants.

WHEREFORE plaintiff having fully replied to the supplemental answer and cross-complaint of said defendants Stanley and Sallo, prays the Court for the relief demanded in his complaint.

J. F. HOBBS and

WILLIAM A. GILMORE,

Attorneys for Plaintiff. [46]

United States of America,
District of Alaska,—ss.

H. Greenberg, being first duly sworn, says: That he is the plaintiff in the above and foregoing action; that he has heard read the above and foregoing reply and knows the contents thereof, and the same is true as he verily believes.

H. GREENBERG.

Subscribed and sworn to before me this 13th day of September, A. D. 1913.

[Notarial Seal] WILLIAM A. GILMORE,
Notary Public in and for the District of Alaska.
My commission expires July 27, 1915.

Service of above and foregoing reply admitted by copy this 13th day of Sept. 1913.

G. J. LOMEN,
Of Attys. for Defs.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Reply and Answer to Supplemental Answer and Cross-complaint of Defendants George Stanley and Sam Sallo. Filed in the office of the Clerk of the District Court of Alaska, Second Division, at Nome, Sept. 15, 1913. J. Sundback, Clerk. By J. A. B., Deputy. J. F. Hobbes and William A. Gilmore, Attorneys at Law. Nome, Alaska, Attorneys for Plaintiff. [47]

*In the District Court for the District of Alaska,
Second Division.*

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS et al.,

Defendants.

Opinion.

On November 1st, 1911, plaintiff H. Greenberg filed his petition in this court alleging that on the 19th day of March, 1910, plaintiff and defendants, Jack Lesamis, John Tyapay and Andy Garbin, entered in to a copartnership agreement to work and mine certain claims described in the complaint; that said copartnership has never been dissolved; and that

plaintiff is entitled to an accounting, and prays that an accounting be had and that the copartnership be dissolved.

Defendants, Lesamis, Tyapay and Garbin, admit in their answer, that “they and the said plaintiff became and were mining copartners under the name and style of Klery Creek Mining Co. and during the summer and fall of 1910 they operated as such copartners one of the claims mentioned in said conveyance, to wit: No. One Above the Star Association Claim on Klery Creek”; but allege that the partnership was dissolved by mutual consent on the 9th day of September, 1910; also allege a conveyance of all their claims and interests to the defendants Stanley and Sallo on the 2d day of September, 1911. The defendants Stanley and Sallo, by their answer, allege that they purchased the interests of Garbin and Lesamis, and are now the owners and have been such owners since September 2d, 1911. Also by their supplemented answer and cross-complaint set up the performance of assessment work on the claims, and [48] allege that the balance of the twenty-four thousand dollars (\$24,000.00) is now due because of plaintiff’s failure to work the mining claims with proper diligence.

Plaintiff by reply denies the affirmative matter of the various answers, also the cross-complaint.

From these pleadings it will be seen that the main issues to be decided by the Court are:

First, was the partnership between plaintiff and defendants Lesamis, Tyapay and Garbin dissolved by mutual consent in September, 1910?

Second, from what fund or proceeds was the balance of the purchase price of twenty-four thousand dollars (\$24,000.00) to be paid?

Third, were the conveyances to Stanley and Sallo valid or void for want of consideration, and if valid, did they take title subject to all obligations of the partnership?

Fourth, are the defendants entitled to credit for expenditures and work done on the claims in controversy to prevent a forfeiture?

The first question should be answered in the negative. All the acts of defendants subsequent to the cessation of operations, in the fall of 1910 up to the time work was closed down in the fall of 1911, were inconsistent with the theory that the partnership had been dissolved in 1910.

In answering the second question, it must be admitted that the deed and contract between plaintiff and defendants were not as explicit as they might be, and if it were not for the interpretation placed upon the instruments by the defendants as indicated by their settlement, in the fall of 1910, and by the subsequent deed executed by two of the defendants, and the general conduct of all of the defendants, the Court would be inclined to construe the contracts to mean that the twenty-four thousand dollars (\$24,000.00) balance of the [49] purchase price should be paid from the proceeds of plaintiff's one-fourth interest, but from the acts of the defendants, it becomes very clear that the intent of the parties was that the balance of the purchase price was to be paid from the net proceeds of the mining claims men-

tioned in the copartnership agreement and deed.

The third proposition to be passed upon by the Court is made clear by the testimony of the defendants. No consideration passed from the grantee to the grantors and as against the plaintiff, at least, the conveyances are void. Defendants Stanley and Sallo can be no more than trustees for defendants Lesamis and Garbin. In view of the fact that defendants Stanley and Sallo appear to hold the title in trust for Lesamis and Garbin, any work done by them for the purpose of protecting the title and preventing a forfeiture should be allowed in the final accounting, and plaintiff Greenberg should be required to pay one-fourth of such necessary expenditures.

Plaintiff Greenberg is entitled to an accounting, and the mining claims mentioned in the complaint are liable for the debts of the copartnership.

The copartnership should be dissolved and the assets of the copartnership sold, and from the proceeds the costs and expenses of this litigation should first be paid, then the indebtedness of the copartnership, after which the balance of the purchase price agreed to be paid by plaintiff Greenberg, and the balance, if any, should be divided equally between the plaintiff Greenberg and the defendants Lesamis, Tyapay and Garbin, or their assigns.

For the purpose of making findings, the Court suggests that at the close of the mining season of 1910, the defendants Lesamis, Tyapay and Garbin were each entitled to receive the sum of two thousand four hundred and sixty-three dollars and eighty-nine cents [50] (\$2,463.89). Lesamis received one thousand,

seventeen hundred twenty-six dollars (\$1,726.00); Tyapay, two thousand dollars (\$2,000.00); Garbin, one thousand five hundred and twelve dollars and nineteen cents (\$1,512.19). The balance remained on hand and they should each receive credit for the respective amounts to be applied on the next year's expense. Said defendants should each pay one-fourth of the 1911 expense, less this credit from the 1910 operations, and plaintiff Greenberg should, after applying the gross output for that year, be charged with the balance of the expense for the year 1911. It does not appear from the testimony that the plaintiff Greenberg contributed anything towards the expense for the year 1911 except by securing a line of credit with the Robinson-Magids Company, and everything furnished by said company was charged to the Klery Creek Co. and not to the plaintiff Greenberg.

Let findings of fact and conclusions of law be prepared in accordance with this memorandum opinion.

CORNELIUS D. MURANE,

U. S. District Judge.

Dated this 21st day of October, 1913, Nome, Alaska.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg vs. Jack Lesamis et al. Memo. Opinion. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 21, 1913. John Sundback, Clerk. By J. A. B., Deputy. [51]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,
GEORGE STANLEY and SAM SALLO,

Defendants.

Findings of Fact and Conclusions of Law.

This cause being an equitable action, having come on regularly to be heard before the Court on the 15th day of September, 1913, and the trial thereof continuing thereafter from day to day to the 19th day of September, 1913, the plaintiff appearing in person and by his attorneys Messrs. J. F. Hobbes and William A. Gilmore, and the defendants appearing in person and by their attorney, G. J. Lomen, Esq., and witnesses on behalf of the plaintiff and defendants having been sworn and testified, and documentary evidence and depositions on behalf of the parties hereto having been read and introduced in evidence, and the Court having heard the arguments of counsel for the respective parties and having thereafter and on the 21st day of October, 1913, rendered and filed its written opinion herein, and being now fully advised in the premises, makes the following FINDINGS OF FACT AND CONCLUSIONS OF LAW, to wit:

FINDINGS OF FACT.

I.

The Court finds that heretofore and on the 19th [52] day of March, 1910, and for a long time prior thereto, the defendants, Jack Lesamis, John Tyapay and Andy Garbin were the owners and in the possession of certain placer mining claims situated in the Noatak-Kobuk Mining and Recording District, District of Alaska, and that legal title to said placer mining claims stood in the names of said defendants by virtue of certain placer locations by them made in said mining district; that on the said 19th day of March, 1910, the said defendants, Jack Lesamis, John Tyapay and Andy Garbin, entered into certain written instruments whereby and wherein they agreed with the plaintiff to form a copartnership to work and mine said mining claims, and to give and convey to the plaintiff an undivided one-quarter ($\frac{1}{4}$) interest in all of said placer claims, lode claims and water rights then owned, acquired or to be acquired by said defendants in consideration of the plaintiff furnishing them with provisions from time to time from the said 19th day of March, 1910, to July, 1910, and agreed to pay the defendants the sum of six thousand dollars (\$6,000) in cash and thereafter the further additional sum of twenty-four thousand dollars (\$24,000) from the net profits of said mining operations to be thereafter conducted and had upon said mining claims; that the said agreement between the parties, plaintiff and said defendants, was reduced to writing and incorporated in the following

two written instruments, which said instruments were executed, witnessed and delivered between the parties, to wit:

“AGREEMENT.

Klery Creek, March 19th, 1910.

Know all men by these presents That we the undersigned John Tyapay, Andy Garbin and Jack Lesamis of the Noatak-Kobuk recording [53] district, District of Alaska, and H. Greenberg of Nome, Ala. enter into this agreement, that for the sum of one dollar lawful money of the United States in hand paid and other valuable services, for same services H. Greenberg is, and shall be a full fledged partner with the above mentioned parties & have one quarter undivided interest in all claims, lodes, water rights acquired or to be acquired and owned by the above-mentioned parties. It is further agreed that H. Greenberg is to furnish the above mentioned parties with Provisions from time to time up till July, 1910.

ANDY GARBIN. (Seal)

JACK LESAMIS. (Seal)

JOHN TYAPAY. (Seal)

H. GREENBERG.

Witnesseth:

SAM MAGIDS,

HERMAN BERNHARDT.

This indenture made the 19th day of March in the year of our Lord one thousand nine hundred and ten between the undersigned Andy Garbin, Jack Lesamis and John Tyapay of the Noatak-Kobuk Recording District, of the District of Alaska, parties of the first part and H. Greenberg of Nome, Alaska, party of the second part witness, That the said parties of the first

part, for and in consideration of the sum of Thirty thousand dollars (\$30,000.00).

Six Thousand dollars (\$6,000.00) in lawful money of the United States of America to them in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, and the balance of twenty-four thousand to be paid of the first money taken out of the ground hath, granted, bargained, sold, remised, released, and forever quit-claimed and by these presents doth grant, bargain, sell, remise release and forever quit-claim unto the said party of the second part, his heirs and assigns one quarter ($\frac{1}{4}$) undivided of all [54] mining claims located surveyed, *ecorded* and held by said parties of the first part situated in Noatak-Kobuk mining district *district* of Alaska, together with all the dips, spurs and angles and also the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had or enjoyed; and also all and singular the tenements, hereditaments and appurtenances, thereunto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well as in law as in equity, of the said party of the first part, of in or to the said premises and every part or parcel thereof, with appurtenances.

To have and to hold, all and singular, *he* said premises, together with the appurtenances and privileges thereto incident, unto the said party of the

second part his heirs and assigns forever warranting and defending the same against the claims of all persons, save and except the United States.

ANDY GARBIN. (Seal)

JACK LESAMIS. (Seal)

JOHN TYAPAY. (Seal)

Witnesseth:

SAM MAGIDS,

HERMAN BERNHARDT.”

II.

The Court finds that thereafter and at all times since said 19th day of March, 1910, plaintiff has fulfilled and carried out the terms, covenants and conditions on his part to be done, made, kept and performed, and did furnish the [55] defendants with the provisions mentioned in said written instrument and did pay to the defendants the sum of \$6,000.00 in lawful money of the United States, and the said defendants thereupon and in pursuance of the terms of said written instrument, entered into the mining copartnership known, named and called the Klery Creek Mining Company, and thereupon began mining operations upon said placer claims heretofore referred to and hereinafter named and set forth.

III.

The Court finds that at the time said instruments were executed and delivered and at the time said mining copartnership was formed, the said defendants Jack Lesamis, John Tyapay and Andy Garbin, were the owners and in the possession of the following placer mining claims, to wit:

Discovery Claim; One Above Discovery, Two Above Discovery, Six Below Discovery, Fraction between Two and Three Above Discovery, Association Fraction between Discovery and Starr, California Association, L. L. Klery Creek, opposite Discovery, Butte Association, R. L. Klery Creek, opposite Discovery, Oregon Association (Bench and Creek) adjoining upper and Starr, and lower end of 1 and 2 Above Discovery, Bench Seven, opposite Creek Claim Seven Below Gold Hill Association R. L. opposite 1, 2, 3 and 4 creek claims, all the foregoing claims being situated on Klery Creek, or its benches; also Honey Claims, one and two, between Klery and Bear Creeks, Northpole Association L. L. Adjoining claims, last above described, One and Two Above Discovery, on Bear Creek, Goldfield Association, opposite 1 and 2 above and 1 below L. L. Bear Creek, Rich Association on Bear Creek, and adjoining 2 above [56] Central Association, adjoining No. 1 below on Central Creek, Discovery on Central Creek, One above on Central Creek, One Below on Central Creek, Fraction (Garbin) on Central Creek, Discovery Claim on Jack Creek, a tributary of Klery; all interest of said first party in all mining claims owned in whole or part in Rocky Creek, in said mining and recording district.

And the Court further finds that all of said mining claims were put into said mining copartnership as assets by said defendants, and thereupon the said Klery Creek Mining Company entered into possession of said claims and began to mine and operate the same as a mining copartnership; that thereafter the

said Klery Creek Mining Company operated said mining claims on said Klery Creek and vicinity, in the Noatuk-Kobuk Recording District, between the said 19th day of March, 1910, and the first day of September, 1911; that during said term and time said mining claims were operated at a loss to said mining copartnership of \$16,484.82, and that said indebtedness is due with legal interest to date, to Robinson-Magids & Company, or its assignee, for goods, wares and merchandise and for money advanced and paid out at the request of said Klery Creek Mining Company.

IV.

The Court finds that on or about the first day of September, 1911, the said Klery Creek Mining Company executed several written leases upon several of the said mining claims above mentioned belonging to the said Klery Creek Mining Company, for the purpose of having said mining claims mined during the winter of 1911, under all of which leases certain stipulated [57] royalties were reserved to be paid to the said mining copartnership.

V.

The Court finds that theretofore and on or about the first day of September, 1911, the defendants Andy Garbin and Jack Lesamis, in violation of the terms and conditions of the said copartnership agreement, conveyed, without consideration, to defendants George L. Stanley and Sam Sallo, all of their right, title and interest in the said Klery Creek Mining Company copartnership property, real and personal, and the Court finds that said conveyances were void

as against the plaintiff and the creditors of said Klery Creek Mining Company, and that said defendants, Stanley and Sallo are trustees for defendants Garbin and Lesamis.

VI.

The Court finds that the said written instruments executed and delivered as above set forth were thereafter recorded in the office of the Noatuk-Kobuk Recording District, on the 29th day of March, 1910, and the said defendants, George L. Stanley and Sam Sallo took and received the said transfers of title from the said defendants Andy Garbin and Jack Lesamis, with full knowledge and notice of the said copartnership and with full knowledge and notice of the fact that the said Klery Creek Mining Company had outstanding indebtedness at said time of the sum of \$16,484.82, incurred in mining operations theretofore conducted. [58]

VII.

The Court finds that all of said royalties due or collected from the placer claims above described and set forth belonged to the Klery Creek Mining Company.

VIII.

The Court finds that heretofore and on the 24th day of October, 1911, one Philip Murphy, claiming an assignment of the account of Robinson-Magids & Company, creditors of said Klery Creek Mining Company, began an action at law in the above-entitled court, for the collection of \$17,124.00 and interest, against the said Klery Creek Mining Company, and caused to be issued a writ of attachment against

the mining property of said Klery Creek Mining Company; that the indebtedness of the said Klery Creek Mining Company to the said Philip Murphy, assignee of said Robinson-Magids & Company, should be paid from the first proceeds of the assets and property of said Klery Creek Mining Company, after the expenses of this litigation is settled, and before any balance sum due the said defendants is paid, from the proceeds or assets of said mining copartnership.

IX.

The Court finds that owing to the acts and actions of the defendants, it is impossible for the plaintiff and said defendants to further act and conduct the mining copartnership in the management and workings of said mining copartnership property and mining claims; that said defendants Stanley, Sallo, Garbin, Lesamis and Tyapay, are all insolvent [59] and have no other property of value other than their interest in said copartnership property, and that the assets of the said Klery Creek Mining Company consists of said mining claims above described, and certain personal property incident thereto and upon said mining claims, and that the said Klery Creek Mining Company has no money or other property except the said placer claims and personal property therewith connected to pay its indebtedness.

X.

The Court finds that the total gold production of 1910 of said Klery Creek Mining Company was \$16,251.42 and that the total expense of the said Klery Creek Mining Company for 1910 was \$8,959.75,

leaving a net profit of \$7,391.67, of which the said defendant, Jack Lesamis received \$1,726.00; John Tyapay, \$2,000.00, and Andy Garbin, \$1,512.12, and the said Lesamis had a credit for 1911 of \$737.89, and the said John Tyapay had a credit of \$463.89, and the said Andy Garbin had a credit of \$951.70.

That the total expense for the year 1911 was \$26,271.70 and the total gold production for the year 1911 amounted to \$9,786.88, leaving an indebtedness due the Robinson-Magids & Company or its assignee, Philip Murphy, of \$16,484.82 on the first day of September, 1911, with legal interest to date, amounting to \$2,830.12; that the Court further finds that the defendants in the years 1911 and 1912, in order to prevent a forfeiture, did the annual assessment work on certain claims mentioned in paragraph V of the supplemental answer and cross-complaint of defendants Stanley and Sallo, of the total value [60] of \$2,400.00, and that said amount is chargeable as indebtedness against the said Klery Creek Mining Company, and the defendants are entitled to be credited with the same.

XI.

The Court finds that the total indebtedness of said Klery Creek Mining Company, due to said Robinson-Magids & Company, or its assignee, Philip Murphy, with legal interest to date, amounts to \$19,314.94, and that each of the said partners would be indebted to the said Klery Creek Mining Company for the sum of \$4,828.73, less the credits above mentioned, and that the said defendant Lesamis is indebted to the said Klery Creek Mining Company in

the sum of \$4,429.21; that the said defendant Tyapay is indebted to the Klery Creek Mining Company in the sum of \$4,703.21; that the said defendant Garbin is indebted to the said Klery Creek Mining Company in the sum of \$4,215.40; that the plaintiff Greenberg is indebted to the Klery Creek Mining Company in the sum of \$5,967.10.

XII.

The Court finds that it was the intent and meaning of the parties in forming said copartnership that the balance payment of \$24,000 was to be paid from the net profits from the mining operations of the copartnership property, and that the defendants, Jack Lesamis, Andy Garbin and John Tyapay, have received on the said sum of \$24,000 the total sum of \$5,238.19, leaving a balance due to said defendants or their assigns from the net profits, the sum of \$18,761.81. [61]

XIII.

The Court finds that the allegations contained in the answers of the defendants that said balance payment was due from the first gold-dust extracted and taken from the undivided one-quarter ($\frac{1}{4}$) interest in said mining property, is not supported by the evidence, and is untrue.

XIV.

The Court further finds that all allegations in the answers of the defendants and in their supplemental answer and cross-complaint inconsistent with the above and foregoing findings, are not supported by the evidence in the case and are untrue.

Conclusions of Law.

And from the above and foregoing Findings of Fact, the Court now makes the following

CONCLUSIONS OF LAW.**I.**

That the plaintiff, Greenberg, is entitled to an accounting and the mining claims and personal property situated thereon, mentioned in the complaint, are liable for the debts of the copartnership; that the copartnership should be dissolved and the assets of the copartnership sold, and from the proceeds the costs and expenses of this litigation should be paid, then the indebtedness of the copartnership, after which the balance of the purchase price agreed to be [62] paid by the plaintiff Greenberg should be paid, and the balance, if any, of said proceeds should be equally divided between the plaintiff Greenberg and the defendants Lesamis, Tyapay and Garbin, or their assigns.

II.

That the plaintiff Greenberg is entitled to a final decree of this Court dissolving the said copartnership and directing the sale of the assets thereof, and the application of the proceeds of said assets to the payment of the indebtedness of said copartnership, and the distribution of the same, as above provided.

Done in open court this 28 day of October, 1913.

CORNELIUS D. MURANE,

District Judge.

Service of foregoing Findings and Conclusions ad-

mitted by receipt of a copy this 24th day of Oct., 1913.

G. J. LOMEN,
Of Attys. for Defs.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Findings of Fact and Conclusions of Law. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 28, 1913. John Sundback, Clerk. By J. A. B., Deputy. J. F. Hobbes and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. Vol. 10. Orders & Judgments, p. 359. C. [63]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN, GEO. STANLEY and SAM SALLO,
Defendants.

**Defendants' Exceptions to the Findings of Fact and
Conclusions of Law.**

Now come the defendants above named and except to the Findings of Fact and Conclusions of Law, made and filed herein on the 28 day of October, 1913, and in particular as follows:

1.

The defendants except to the first Finding of Fact for the reason and on the ground that the same is not justified by the evidence, and except in particular to that portion of said finding wherein the Court finds that on the 19th day of March, 1910, the said defendants Jack Lesamis, John Tyapay and Andy Garbin, entered into certain written instruments whereby and wherein they agreed with the plaintiff [64] to form a copartnership to work and mine the said mining claims therein described, and to give and convey to the plaintiff an undivided one-quarter interest in all of said placer claims, lode claims and water rights, then owned, acquired or to be acquired by said defendants, in consideration of the plaintiff furnishing them with provisions from time to time from said 19th day of March, 1910, to July, 1910, and agreed to pay the defendants the sum of \$6,000.00 in cash, and thereafter the further and additional sum of \$24,000.00 from the net profit of said mining operations, to be thereafter conducted and had upon said mining claims.

2.

The defendants except to the second Finding of Fact on the ground and for the reason that the same is not justified by the evidence, and particularly except to that portion of said finding wherein it is found that the plaintiff has fulfilled and carried out the terms, covenants and conditions of said contract on his part to be done, made, kept and performed, and also especially except to that portion of said finding wherein it is found by the Court that said de-

fendants in pursuance of the terms of the written instruments set out in Finding No. 1, entered into the mining copartnership known as the Klery Creek Mining Company, and thereupon began mining operations upon said placer mining claims referred to in said Finding No. 1; and said defendants request the Court to find when and in what manner mining operations were commenced upon said placer mining claims, or any of them, other than on the claim known as No. 1 Above the Star Association on Klery [65] Creek; and defendants further request the Court to find as a matter of fact that the mining copartnership between plaintiff and the defendants, Lesamis, Tyapay and Garbin, was dissolved upon notice, and by the conduct and implications of the parties in September, 1910.

3.

The defendants except to Finding of Fact No. 3, for the reason and on the ground that the same is not justified by the evidence, and said defendants particularly except to that portion of said finding wherein the Court finds that said mining claims were put into said mining copartnership as assets by said defendants and thereupon said Klery Creek Mining Company entered into the possession of said claims and began to mine and operate the same as a mining copartnership. And said defendants request the Court to find as a matter of fact when and in what manner any of said mining claims were put or brought into said mining copartnership as assets, or otherwise, and when and in what manner the Klery Creek Mining Company, entered into the possession

of said claims, or any of them, and on what claim or claims, if any, the said Klery Creek Mining Company, began to mine and operate any claim or claims as a mining copartnership.

And the defendants except particularly to that portion of said finding wherein the Court finds that the Klery Creek Mining Company operated said claims on said Klery Creek and vicinity, and any claim other than No. 1 Above the Star Association on said Klery Creek; and also especially except to that portion of said finding wherein the Court finds as a fact that the parties to said action operated any mining claim after September, 1910, whether at a loss or [66] otherwise. And the defendants request the Court to find that all mining operations on the mining claims belonging to the parties to said action during the year 1911, were done by and at the risk of the plaintiff, H. Greenberg, and at his own loss.

And defendants except particularly to that portion of said finding wherein the Court finds that any claim or claims were operated during the year 1911, at a loss to said mining copartnership known as the Klery Creek Mining Company, and that said loss amounted to \$16,484.82, and that said indebtedness is due with legal interest to date, to Robinson, Magids & Company, or its assigns, for goods, wares and merchandise and for money advanced and paid out at the request of said Klery Creek Mining Company, said last portion of said finding being not only not justified by the evidence but is irrelevant and immaterial to the issues in said action.

4.

The defendants above named except to Finding of Fact No. 4 herein on the ground and for the reason that the same is not justified by the evidence, and especially except to that portion of said finding wherein the Court finds that the Klery Creek Mining Company, executed several written leases of said mining claims. And said defendants request the Court to find that all leases issued upon mining claims mentioned in said finding were executed and delivered by the owners of said claims, said plaintiff and defendants, as tenants in common and not otherwise.

And defendants especially except to that portion of said finding wherein the Court finds that under all of said leases certain stipulated royalties were reserved to be [67] paid to the said mining copartnership. And the defendants request the Court to find as a matter of fact that all reservation of royalties in said leases were made for the use and benefit of the lessors therein named, the said plaintiff and defendants as tenants in common, and not to any mining copartnership. And the defendants request the Court to find as a matter of fact by whom royalties were reserved and collected on account of said leases and what amount of royalty was reserved and collected, and by whom.

5.

The defendants except to the fifth Finding of Fact for the reason and on the ground that the same is not justified by the evidence, and especially except

to that portion of said finding wherein the Court finds as a matter of fact that the defendants Andy Garbin, and Jack Lesamis, in violation of the terms and conditions of said, or any, copartnership agreement, conveyed, without consideration, to the defendants George L. Stanley and Sam Sallo, all of their right, title and interest in the Klery Creek Mining Company's copartnership property, and also to that portion of said finding wherein the Court finds that said conveyances were void as against the plaintiff and the creditors of said Klery Creek Mining Company, and also to that portion of said finding wherein the Court finds that said Stanley and Sallo are trustees for the defendants, Garbin and Lesamis.

6.

The defendants except to the sixth Finding of Fact on the ground and for the reason that the same is not justified by the evidence, and especially except to that [68] portion of said finding wherein the Court finds that the conveyances to said defendants, Stanley and Sallo were recorded March 29th, 1910, and also to that portion of said finding wherein the Court finds that the defendants, Stanley and Sallo, had knowledge and notice of the fact that said Klery Creek Mining Company had outstanding indebtedness at said time in the sum of \$16,484.82.

7.

The defendants except to the seventh Finding of Fact on the ground and for the reason that the same is not justified by the evidence.

8.

The defendants except to the eighth Finding of Fact on the ground and for the reason that the same is not justified by the evidence, to wit, so much thereof that finds that the indebtedness of said Klery Creek Mining Company, to said Philip Murphy, assignee of Robinson, Magids & Company, should be paid from the first proceeds of the assets and property of said Klery Creek Mining Company, or at all. And said defendants request the Court to find as a matter of fact that the action brought by Philip Murphy, against the Klery Creek Mining Company, is still pending and untried, and that the allegations of the complaint of said Philip Murphy are traversed by the answer of the defendants herein.

9.

The defendants except to the ninth Finding of Fact herein on the ground and for the reason that the same is not justified by the evidence, and said defendants request the Court to find as a matter of fact that the partnership existing between the plaintiffs and defendants herein was [69] long since dissolved.

The defendants further especially except to said finding and that portion thereof wherein the Court finds that the defendants Stanley, Sallo, Garbin, Lesamis and Tyapay are all insolvent. And said defendants request the Court to find as a matter of fact that said plaintiff, H. Greenberg, is solvent, and that said plaintiff, Greenberg is indebted to each of said defendants in large sums of money, and in amounts greater than any indebtedness of said defendants, or

any of them, and that the Court further find the amount of the indebtedness due from said plaintiff to each of said defendants.

The defendants except to that portion of said finding wherein the Court finds that the defendants have no other property of value other than their interest in said copartnership property, and also to that portion of said finding wherein the Court finds that the assets of said Klery Creek Mining Company consist of said mining claims theretofore described.

10.

The defendants except to the tenth Finding of Fact on the ground and for the reason that the same is not justified by the evidence, and especially to so much of said finding as finds as a matter of fact that the total expenses for the year 1911 of the Klery Creek Mining Company, were \$8,959.75 or more than \$7,788.62, and again to so much of said finding as finds as a fact that there is an indebtedness due to the Robinson, Magids Company, or its assignee, Philip Murphy, of \$16,484.82, with legal interest from September 1st 1911, and to so much of said finding as finds that the amount due for assessment work, viz., \$2,400.00, is due the [70] defendants, and that the defendants other than Stanley and Sallo are entitled to be credited with the same.

11.

The defendants except to the eleventh Finding of Fact herein on the ground and for the reason that the same is not justified by the evidence, and to each and every part thereof.

12.

The defendants except to the twelfth Finding of Fact herein on the ground and for the reason that the same is not justified by the evidence, and especially to so much of said finding that finds as a matter of fact that the \$24,000 in said finding mentioned was or is to be paid from the net profits from the mining of the copartnership property. And the defendants request the Court to find as a matter of fact that said \$24,000 was the balance of purchase money unpaid and is due by the plaintiff H. Greenberg out of his undivided one-quarter interest in the property mentioned in the complaint and not otherwise, whether out of the gross or net proceeds of such one-quarter interest less \$4,085.85 paid thereon.

13.

The defendants except to the thirteenth Finding of Fact on the ground and for the reason that the same is not justified by the evidence, and especially to so much of said finding as finds that the balance of said \$24,000.00, is not due from said undivided one-quarter interest in said mining property, to wit, out of the plaintiff Greenberg's interest in said property.
[71]

14.

The defendants except to the fourteenth Finding of Fact herein on the ground and for the reason that the same is not justified by the evidence.

15.

The defendants further request the Court to find that the plaintiff Greenberg is indebted to the defendants Stanley and Sallo in the sum of twelve

hundred (\$1200.00) dollars on account of assessment work; or, if the Court does not so find, then that the Kleary Creek Mining Company is indebted to them on account of assessment work in the sum of twenty-four hundred (\$2400.00) dollars.

16.

The defendants request the Court to find that the plaintiff Greenberg appropriated and turned over to Robinson, Magids & Company gold-dust belonging to the owners of the Star Association Claim, that the value of said gold-dust so appropriated and turned over was of the value of sixteen hundred twenty-nine and 94/100 (\$1629.94) dollars.

17.

The defendants request the Court to find that the plaintiff Greenberg received as royalty from the Oregon Claim gold-dust to the amount and value of thirteen hundred (\$1300.00) dollars.

18.

The defendants request the Court to find that the interests of Greenberg, Tyapay, Lesamis and Garbin, and the assigns of Lesamis and Garbin, in the Oregon Claim are equal, to wit, an undivided one-eighth each.

19.

The defendants request the Court to find that the defendants Tyapay, Lesamis and Garbin satisfied their contract with plaintiff Greenberg in the matter of the latter's interest in after-acquired [72] property by staking and locating an undivided one-eighth interest in the Oregon Claim in the name of said Greenberg, and that said Greenberg has no right,

title or interest to the undivided one-eighth located severally in the names of said Tyapay, Lesamis and Garbin.

20.

The defendants request the Court to find that the only agreement of partnership existing between the plaintiff and the defendants is the written agreement set forth in the plaintiff's complaint.

21.

The defendants request the Court to find that the claim and demand of Robinson, Magids & Company or the assignee Philip Murphy is now in litigation in an action in said court wherein said Philip Murphy is plaintiff and the Kleary Creek Mining Company is defendant, and that said action is still pending undetermined and continued until the opening of navigation in 1914.

22.

The defendants request the Court to find that in the expenses of the mining operations of the Kleary Creek Mining Company for the year 1910 there is an overcharge for groceries furnished in the sum of nine hundred thirty-three and 13/100 (\$933.13) dollars, which amount was to have been furnished by Greenberg without charge.

23.

The defendants further request the Court to find that in the item of expense for the year 1911 the sum of three hundred thirteen and 38/100 (\$313.38) dollars has been charged on monthly balances of Robinson, Magids & Company, and that no interest should be charged on running accounts except from

the date of the last item. [73]

24.

The defendants request that the Court find that the sum of eight hundred (\$800.00) dollars sought to be charged against the defendant Lesamis on account of gold-dust furnished Martin Moran should be charged equally to the defendants Lesamis, Tyapay and Garbin.

25.

The defendants request the Court to find that the mining copartnership known as the Kleary Creek Mining Company was a partnership organized without any definite term, was a partnership at will, and that the same was dissolved upon notice September 9th, 1910. [74]

The defendants above named except to the Conclusions of Law contained in paragraph one of said conclusions for the reasons that the same is contrary to law, and especially so much thereof as finds that the balance of the purchase price, to wit, said \$24,000.00, should be paid out of the proceeds of a sale of said mining claims; and the defendants request the Court to find that the balance of said \$24,000.00, to wit, the sum of \$19,914.15, is now due and owing from the plaintiff Greenberg to the defendants, and that said defendants have a lien upon the interest of said Greenberg in said mining claims for the payment thereof.

2.

The defendants except to the second Conclusion of Law herein for the reason that the same is contrary

to law, and for like reason to each and every part thereof.

3.

The defendants request the Court to find as a conclusion of law that in case of a sale of the mining claims mentioned in the complaint under any decree of the Court herein, that any, some, or all of the parties hereto may become bidders at said sale, and that in the event that said premises, or any part thereof, shall be bid in in the name of the defendants or either or any of them, then said defendant or defendants shall, as against the plaintiff Greenberg, be credited with any amount due from said Greenberg to him, or them on the amount bid over and above the expenses of litigation, and the debts of the Kleary Creek Mining Company, the same to be determined from the findings and decree herein. [75]

4.

The defendants request the Court to find that as a conclusion of law in case of a sale of said premises the amount realized on said sale, less the costs of this action and the expenses of sale, shall remain in the custody of the Court until the final determination of any action or actions pending on behalf of any of the creditors of the Kleary Creek Mining Company, and until the further order of the Court.

5.

The defendants request the Court to find that the defendants are entitled to judgment against the plaintiff Greenberg for the sum of nineteen thousand nine hundred fourteen and 15/100 dollars (\$19,914.-15), being the balance due for the one-quarter in-

terest in the premises described in the complaint, and that the defendants Stanley and Sallo have judgment against said Greenberg for the sum of twelve hundred (1200.00) dollars on account of assessment work performed by them upon the premises described in the complaint, and that the defendants have judgment against the plaintiff Greenberg for the sum of nine hundred thirty-three and 13/100 (933.13) dollars overcharge on account of groceries furnished prior to July, 1910.

6.

The defendants request the Court to find as a conclusion of law that the plaintiff Greenberg should pay to the partnership fund his share of the expenses for the year 1910 and 1911, amounting to the sum of fifty-nine hundred sixty-seven and 10/100 dollars (\$5,967.10) and over before any sale of the premises described in the complaint be made in view of the personal [76] indebtedness of said plaintiff to the defendants in furtherance of justice and in furtherance of the lien of the defendants for the purchase money agreed to be paid by said Greenberg and in reduction and liability of the defendants to the creditors of the Kleary Creek Mining Company.

G. J. LOMEN,

O. D. COCHRAN,

Attys. for Defts.

[Endorsed]: No. 2349. (Orig.) In the District Court for the District of Alaska, Second Division. H. Greenberg vs. Jack Lesamis et al. Defts. Exceptions to Findings, etc. Filed in the Office of the Clerk

of the District Court of Alaska, Second Division, at Nome. Oct. 28, 1913. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen and O. D. Cochran, Attys. for Defts. [77]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY and SAM
SALLO,

Defendants.

Decree.

This cause came on regularly to be heard before the Court without a jury, on the 15th day of September, 1913, and the trial thereof continued from day to day until the 19th day of September, 1913, the plaintiff appearing in person and by his attorneys, Messrs. J. F. Hobbes and William A. Gilmore, and the defendants appearing in person and by their attorney, G. J. Lomen, Esq., and witnesses on behalf of the plaintiff and defendants having been sworn and testified, and documentary evidence and depositions on behalf of the parties hereto being read and introduced in evidence, and the Court having heard the arguments of counsel for the respective parties, and having taken the same under advisement, and having thereafter, on the 21st day of October, 1913,

filed its written opinion herein, finding for the plaintiff and against the defendants, and having heretofore on the 28 day of October, 1913, made and filed its findings of fact and conclusions of law herein, and being now fully advised in the premises, and upon motion of attorneys for plaintiff, it is hereby

ORDERED, ADJUDGED AND DECREED, that the plaintiff do have judgment as prayed for in his complaint herein, against the defendants and each of them; that the mining copartnership [78] between plaintiff and defendants named the Klery Creek Mining Company, be, and the same is hereby dissolved; that the plaintiff be, and he is hereby granted an accounting between the plaintiff and defendants of all and every matter and thing arising under and by virtue of the mining copartnership known as the Klery Creek Mining Company, in accordance with the findings of the Court, heretofore made, filed and entered; and it is further ORDERED, ADJUDGED AND DECREED, that all the assets of the said Klery Creek Mining Company consist of mining claims and personal property situated thereon, and therewith connected, hereinafter named; that under and by virtue of said accounting that said Klery Creek Mining Company is indebted to the Robinson-Magids & Company, or to Philip Murphy, its assignee in the sum of \$16,484.82, with legal interest from September 1st, 1911, to date, amounting to \$2,830.12, amounting in principal and interest in all, to the sum of \$19,314.94, and that of said indebtedness the defendant Jack Lesamis owes to the Klery Creek Mining Company the sum of

\$4,429.21; that the said defendant John Tyapay is indebted to the said Klery Creek Mining Company in the sum of \$4,703.21; and the said defendant, Andy Garbin, is indebted to the said Klery Creek Mining Company in the sum of \$4,215.40, and the plaintiff, H. Greenberg, is indebted to the said Klery Creek Mining Company in the sum of \$5,967.10; it is further ORDERED, ADJUDGED AND DECREED that the plaintiff, H. Greenberg, is entitled to have the assets of said copartnership sold and the proceeds applied to the payment of said indebtedness, said assets of said copartnership being the mining claims described in plaintiff's complaint, and in the findings of fact heretofore made and filed by the Court, together with the personal property thereon situated, said mining claims all situated and located in the Noatak-Kobuk Mining Precinct, District of Alaska, to wit:

Discovery Claim; One Above Discovery; Two Above [79] Discovery, Six Below Discovery, Fraction between Two and Three Above Discovery, Association Fraction between Discovery and Starr, California Association, L. L. Klery Creek, opposite Discovery, Butte Association, R. L. Klery Creek, opposite Discovery, Oregon Association (Bench and Creek) adjoining upper and Starr, and lower end of 1 and 2 Above Discovery, Bench Seven, opposite Creek Claim Seven Below, Gold Hill Association, R. L., opposite 1, 2, 3 and 4 creek claims, all the foregoing claims being situate on Klery Creek, or its benches; also Honey Claims, one and two, between Klery and Bear Creeks, Northpole Association L. L. adjoin-

ing claims last above described, One and Two Above Discovery on Bear Creek, Goldfield Association opposite 1 and 2 above and one below L. L. Bear Creek, Rich Association on Bear Creek, and adjoining 2 above Central Association, adjoining No. 1 below on Central Creek, Discovery on Central Creek, One Above on Central Creek, One Below on Central Creek, Fraction (Garbin) on Central Creek, Discovery Claim on Jack Creek, a tributary of Klery; all interest of said first party in all mining claims owned in whole or in part in Rocky Creek in said mining and recording district.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendants George Stanley and Sam Sallo are the trustees for the defendants Andy Garbin and Jack Lesamis, respectively, and that said defendants Stanley and Sallo, by the conveyances made to them, took and now hold the legal title to the property described in said conveyances in trust for said defendants Andy Garbin and Jack Lesamis, and subject to the said indebtedness of the said Klery Creek Mining Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the United States Marshal for the District of Alaska, Second Division, sell, the whole of said assets, both personal and real above described, under order and execution of the Court in [80] this action in the manner provided by law, and pay the proceeds of said sale to the clerk of the above-entitled court and that said clerk pay and distribute the said proceeds so received by him in the following manner:

1. The plaintiff's costs and expenses in this litigation.

2. The said indebtedness of the Klery Creek Mining Company to Robinson-Magids & Company or Philip Murphy, as assignee.

3. The balance of said proceeds if any, to the defendants or their assigns, to the amount of \$18,761.81.

4. The balance of said proceeds, if any, still remaining, to be distributed equally between the plaintiff and the defendants, Andy Garbin, Jack Lesamis, John Tyapay, or their assigns.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiff do have judgment and execution against the defendants and each of them, for his costs and disbursements in this action, taxed at the sum of \$141.95 dollars.

Done in open court this 28 day of October, 1913.

CORNELIUS D. MURANE,

District Judge.

Service of foregoing decree admitted by receipt of copy this 24th day of Oct., 1913.

G. J. LOMEN,

Of Attys. for Defs.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Decree. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 28, 1913. John Sundback, Clerk. By J. A. B., Deputy. J. F. Hobbes and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for

Plaintiff. J. D. 2, p. 218. Vol. 10, Orders and Judgments, p. 368. C. [81]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS et al.,

Defendants.

**Defendants' Objections and Exceptions to
Judgment.**

Now come the defendants in the above-entitled action and object and except to the judgment and decree made, filed and entered herein on the 28th day of October, 1913, and to the whole thereof, on the grounds and for the reasons that said judgment is:

1. Not justified by the pleadings or issues in the case.

2. Not justified by the evidence.

3. Not justified by the findings.

4. Inequitable and contrary to law.

5. Inconsistent with the findings and inconsistent in itself.

6. Not complete and does not adjudicate all matters involved in the accounting between the parties.

7. It embraces and adjudicates matters not properly in issue.

G. J. LOMEN and

O. D. COCHRAN,

Attorneys for Defendants.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Defendants' Objections and Exceptions to Judgment. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 28, 1913. John Sundback, Clerk. By J. A. B., Deputy. O. D. Cochran and G. J. Lomen, Attorneys for Defendants. [82]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GAR-
BIN, GEORGE STANLEY and SAM
SALO,

Defendants.

Writ of Execution.

The President of the United States of America, to
E. R. Jordan, United States Marshal for the
District of Alaska, Second Division, Greeting:

WHEREAS, on the 28th day of October, 1913, the
above-named plaintiff, H. Greenberg, recovered judg-
ment in the above-named court, against the above-
named defendants, Jack Lesamis, John Tyapay,
Andy Garbin, George Stanley and Sam Salo, which
said judgment is in the words and figures following,
to wit:

*“In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY and SAM
SALLO,

Defendants.

DECREE. [83]

This cause came on regularly to be heard before the Court without a jury, on the 15th day of September, 1913, and the trial thereof continued from day to day until the 19th day of September, 1913, the plaintiff appearing in person and by his attorneys Messrs. J. F. Hobbes and William A. Gilmore, and the defendants appearing in person and by their attorney, G. J. Lomen, Esq., and witnesses on behalf of the plaintiff and defendants having been sworn and testified, and documentary evidence and depositions on behalf of the parties hereto being read and introduced in evidence, and the Court having heard the arguments of counsel for the respective parties, and having taken the same under advisement, and having thereafter, on the 21st day of October, 1913, filed its written opinion herein, finding for the plaintiff and against the defendants, and having heretofore on the 28 day of October, 1913, made and filed its findings of fact and conclusions of law herein,

and being now fully advised in the premises, and upon motion of attorneys for plaintiff, it is hereby

ORDERED, ADJUDGED AND DECREED, that the plaintiff do have judgment as prayed for in his complaint herein, against the defendants and each of them; that the mining copartnership between plaintiff and defendants named the Klery Creek Mining Company, be, and the same is hereby dissolved; that the plaintiff be, and he is hereby granted an accounting between the plaintiff and defendants of all and every matter and thing arising under and by virtue of the mining copartnership known as the Klery Creek Mining Company, in accordance with the findings of the Court, heretofore made, filed and entered; and it is further ORDERED, ADJUDGED AND [84] DECREED, that all the assets of the said Klery Creek Mining Company consist of mining claims and personal property situated thereon, and therewith connected, hereinafter named; that under and by virtue of said accounting that said Klery Creek Mining Company is indebted to the Robinson-Magids & Company, or to Philip Murphy, its assignee, in the sum of \$16,484.82, with legal interest from September 1st, 1911, to date, amounting to \$2,830.12, amounting in principal and interest in all, to the sum of \$19,314.94, and that of said indebtedness the defendant Jack Lesamis owes to the Klery Creek Mining Company the sum of \$4,429.21; that the said defendant John Tyapay is indebted to the said Klery Creek Mining Company in the sum of \$4,703.21; and the said defendant, Andy Garbin, is indebted to the said Klery Creek Mining Company

in the sum of \$4,215.40, and the plaintiff, H. Greenberg, is indebted to the said Klery Creek Mining Company in the sum of \$5,967.10; it is further ORDERED, ADJUDGED AND DECREED that the plaintiff, H. Greenberg, is entitled to have the assets of said copartnership sold and the proceeds applied to the payment of said indebtedness, said assets of said copartnership being the mining claims described in plaintiff's complaint, and in the findings of fact heretofore made and filed by the Court, together with the personal property thereon situated, said mining claims all situated and located in the Noatuk-Kobuk Mining Precinct, District of Alaska, to wit:

Discovery Claim; One Above Discovery; Two Above Discovery, Six Below Discovery, Fraction between Two and Three Above Discovery, Association Fraction between Discovery and Starr, California Association, L. L. Klery Creek, opposite Discovery, Butte Association, R. L. Klery Creek, opposite Discovery, Oregon Association (Bench and Creek) adjoining upper [85] and Starr, and lower end of 1 and 2 Above Discovery, Bench Seven, opposite Creek Claim Seven Below Gold Hill Association R. L. opposite 1, 2, 3 and 4 creek claims. All the foregoing claims being situate on Klery Creek, on its benches; also Honey Claims, one and two, between Klery and Bear Creeks, Northpole Association L. L. Adjoining claims last above described, One and Two Above Discovery on Bear Creek, Goldfield Association opposite 1 and 2 above and one below L. L. Bear Creek, Rich Association on Bear Creek, and

adjoining 2 above Central Association, adjoining No. 1 below on Central Creek, Discovery on Central Creek, One above on Central Creek, One Below on Central Creek, Fraction (Garbin) on Central Creek, Discovery Claim on Jack Creek, a tributary of Klery; all interest of said first party in all mining claims owned in whole or in part in Rocky Creek in said mining and recording district.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendants, George Stanley and Sam Sallo are the trustees for the defendants, Andy Garbin and Jack Lesamis, respectively, and that said defendants, Stanley and Sallo, by the conveyances made to them, took and now hold the legal title to the property described in said conveyances in trust for said defendants, Andy Garbin and Jack Lesamis, and subject to the said indebtedness of the said Klery Creek Mining Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the United States Marshal for the District of Alaska, Second Division, sell, the whole of said assets, both personal and real above described, under order and execution of the Court in this action in the manner provided by law, and pay the proceeds of said sale to the clerk of the above-entitled court and that said clerk pay and distribute the said proceeds so received by him in the following manner: [86]

1. The plaintiff's costs and expenses in this litigation.

2. The said indebtedness of the Klery Creek Mining Company to Robinson-Magids & Company or

Philip Murphy, as assignee.

3. The balance of said proceeds, if any, to the defendants or their assigns, to the amount of \$18,-761.81.

4. The balance of said proceeds, if any, still remaining, to be distributed equally between the plaintiff and the defendants, Andy Garbin, Jack Lesamis, John Tyapay, or their assigns.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the plaintiff do have judgment and execution against the defendants, and each of them, for his costs and disbursements in this action, taxed at the sum of \$141.95 dollars.

Done in open court this 28 day of October, 1913.

CORNELIUS D. MURANE,

District Judge.

Service of the foregoing decree admitted by receipt of copy this 24th day of Oct. 1913.

G. J. LOMEN,

Of Attys. for Defs.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Decree. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 28, 1913. John Sundback, Clerk. By J. A. B., Deputy. J. F. Hobbes and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. J. D. 2, p. 218. Vol. 10, Orders and Judgments, p. 368. C.” [87]

Which said judgment has been duly docketed, as appears to us of record. And

WHEREAS, the said sum of \$141.95, together with interest at the rate of 8% per annum from October 27th, 1913, and costs and accruing costs, is now at the date of this writ actually due to said plaintiff on said judgment, for his costs herein; and

WHEREAS, the said sum of \$19,314.94, together with legal interest from October 27th, 1913, is now at the date of this writ actually due to the said Robinson, Magids & Co., or to Philip Murphy, its assignee, on said judgment; and

WHEREAS, in and by said judgment it is by the Court ordered and adjudged that certain real and personal property, particularly described and set forth in said judgment, be sold to satisfy said judgment in accordance with the terms thereof:

NOW, THEREFORE, You are hereby required to sell all the said real and personal property described in said judgment, and apply the proceeds as directed by said judgment, costs, accruing costs and expenses of executing this writ.

You are ordered to make return of this writ within sixty days after its receipt by you, with what you have done endorsed thereon.

WITNESS the Honorable J. R. TUCKER, Judge of the District Court for the District of Alaska, Second Division, and the seal of the said court affixed hereto, at Nome, Alaska, this 4th day of April, 1914.

[Court Seal]

J. SUNDBACK.

Clerk of the District Court for the District of Alaska, Second Division.

By J. Allison Bruner,

Deputy Clerk. [88]

United States of America,
District of *America*,
Second Division,—ss.

I hereby certify that on April 4th, 1914, at Nome, Alaska, I received the annexed Writ of Execution, and thereafter, on the 23d day of April, 1914, I executed the same by advertising, according to law, the sale of all the right, title, and interest of the defendants in the action herein, in and to those certain placer mining claims, all lying and being situate in the Noatak-Kobuk Mining Precinct District of Alaska, and more particularly described as follows; those certain mining claims known and designated respectively as,

Discovery Claim; One Above Discovery; Two Above Discovery; Six Below Discovery; Fraction between Two and Three Above Discovery; Association Fraction between Discovery and Starr, California Association; L. L. Klery Creek, opposite Discovery; Butte Association; R. L. Klery Creek, opposite Discovery; Oregon Association (Bench and Creek) adjoining upper and Starr, and lower end of 1 and 2 Above Discovery; Bench Seven, opposite Creek Claim Seven Below; Gold Hill Association, R. L., opposite 1, 2, 3 and 4 creek claims; all the foregoing claims being situate on Klery Creek, or its benches; also Honey Claims, one and two, between Klery and Bear Creeks, Northpole Association L. L. adjoining claims last above described; One and Two Above Discovery on

Bear Creek; Goldfield Association, opposite 1 and 2 Above and one Below; L. L. Bear Creek; Rich Association on Bear Creek, and adjoining 2 Above Central Association, adjoining No. 1 Below on Central Creek, Discovery on Central Creek, One Above on Central Creek, One Below on Central Creek, Fraction (Garbin) on Central Creek; Discovery Claim on Jack Creek, a tributary of Klery; all interest of said first party in all mining claims owned in whole or in part in Rocky Creek in said mining and recording district,

by posting a printed notice of the time and place of sale in three public places within five miles of the place of sale four weeks prior to the date of sale, particularly describing said property, one of said notices being posted on the door of the postoffice at Nome, Alaska, and by causing to be published once a week for the same period, on five consecutive week intervening days in the "Nome Daily Nugget," a newspaper of general circulation nearest the place of [89] sale, a like notice, a copy of which, with affidavit of publication, is hereto attached and made a part hereof.

And thereafter on the 29th day of May, 1914, by order of the District Court, I postponed the sale by public proclamation to June 29th, 1914.

And thereafter on the 29th day of June, 1914, by further order of the District Court I postponed the sale by public proclamation for five weeks to August 3d, 1914.

And thereafter on the 3d day of August, 1914, for good and sufficient reasons, I postponed the sale by public proclamation to August 10th, 1914.

And thereafter on the 10th day of August, 1914, at twelve o'clock noon of said day, at the front door of the U. S. Courthouse, at Nome, Alaska, I did offer for sale at public vendue the above-mentioned and described property in separate lots and parcels, and received no bids for same, and I thereupon offered said property and sold the same in one lot and parcel to H. Greenberg, plaintiff herein, for the sum of Three Thousand Dollars, said bid being the highest and best bid received by me.

Returned this 11th day of August, 1914.

E. R. JORDAN,
United States Marshal.
By Elmer Reed,
Deputy.

MARSHAL'S COSTS.

1	Service.....	\$ 6.00
3½%	Commission on \$ 459	16.07
2 %	“ “ 2,500	50.00
	Advertising.....	35.00
		\$107.07

[90]

I HEREBY CERTIFY That I received the annexed Writ of Execution on the 15th day of May, 1914, and thereafter on the 12th day of June, 1914, I did advertise according to law, by posting in three conspicuous places within five miles of the place of sale, and one on the door of the postoffice at Kiana,

Alaska, three notices of sale; a copy of which is annexed hereto and made a part hereof, that I would on the 22d day of June, 1914, at 2 P. M., at the property on Klery Creek, sell at public vendue to the highest and best bidder for cash, all of the right, title and interest of the defendants in and to the following described personal property:

1 portable, canvas covered house, on runners.

1 large iron Vise, No. 88.

1 large Steel Range.

2 large Augers.

And thereafter on the 22d day of June, I did, for good and sufficient reason, postpone said sale until June 26th, 1914, at 2 P. M. And on said latter date I did offer the above-described personal property for sale and sold the same to THOMAS BALDWIN for the sum of Forty-one (\$41.00) Dollars, that being the highest and best bid received.

I return herewith \$17.13, being the amount collected on Execution, less Marshal's costs on this Writ, amounting to \$23.87.

Dated at Kiana, Alaska, June 27th, 1914.

E. R. JORDAN,

United States Marshal.

By C. H. Hawkins,

Deputy.

MARSHAL'S COSTS:

1 service Execution.....	\$ 6.00
Boat fare	7.00
Meals & lodging.....	8.00
	<hr/>
	\$21.00
Commission on sale, at 7%	2.87
	<hr/>
Total exp.....	\$23.87

[91]

COPY.

NOTICE OF MARSHAL'S SALE.

PUBLIC NOTICE IS HEREBY GIVEN, that by virtue of a Writ of Execution dated April 4th, 1914, issued out of the District Court for the District of Alaska, Second Division, on a judgment rendered in said Court in the action of H. GREENBERG, Plaintiff, vs. JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN, GEORGE STANLEY, and SAM SALO, Defendants, and in favor of said Plaintiff, and against said Defendants, I will offer for sale at Public vendue to the highest and best bidder for cash, on the 22nd day of June, 1914, at 2 P. M., at the property on Klery Creek, all of the right, title and interest of the defendants in and to the following described personal property:

- 1 portable, canvas covered house, on runners.
- 1 large iron Vise, No. 88.
- 1 large steel range.
- 2 large Augers..

Dated at Kiana, Alaska, June 11th, 1914.

E. R. JORDAN,
United States Marshal.

By C. H. Hawkins,
Deputy. [92]

AFFIDAVIT OF PUBLICATION.

United States of America,
District of Alaska.

I, E. C. Divine, first being duly sworn, depose and say, that I am the manager of the "Nome Daily Nugget," a daily newspaper published in Nome, Alaska, and that the annexed notice was published in said newspaper once each and every week for six consecutive weeks, said publications being made on April 23d and 30th and on May 7th, 14th, 21st, 28th, 1914.

E. C. DIVINE.

Subscribed and sworn to before me this 28 day of May, 1914.

[Notarial Seal]

O. D. COCHRAN,

Notary Public in and for the District of Alaska.

My Commission Expires Aug. 2, 1915. [93]

NOTICE OF MARSHAL'S SALE.

Public notice is hereby given that by virtue of an order of sale and writ of execution dated the 4th day of April, 1914, issued out of the District Court for the Second Division, District of Alaska, on a judgment and decree rendered in said court on the 28th day of October, 1913, in favor of H. Greenberg and against Jack Lesamis, John Tyapay, Andy Garbin, George Stanley and Sam Salo, I will offer

for sale and sell at public vendue to highest and best bidder for cash, on the 29th day of May, 1914, at the front door of the U. S. Courthouse, Nome, Alaska, at 12 o'clock noon, all of the right, title and interest of the mining copartnership, known as and operating under the name of the Klery Creek Mining Company in and to those certain placer mining claims lying and being in the Noatak-Kobuk Mining Precinct, District of Alaska, to wit:

Discovery Claim; One Above Discovery; Two Above Discovery, Six Below Discovery, Fraction between Two and Three Above Discovery, Association Fraction between Discovery and Starr, California Association, L. L. Klery Creek, opposite Discovery, Butte Association, R. L. Klery Creek, opposite Discovery, Oregon Association (Bench and Creek) adjoining upper and Starr, and lower end of 1 and 2 Above Discovery, Bench Seven, opposite creek claim Seven Below, Gold Hill Association, R. L., opposite 1, 2, 3 and 4 creek claims; all the foregoing claims being situate on Klery Creek, or its benches; also Honey Claims, one and two, between Klery and Bear Creeks, Northpole Association L. L. adjoining claims last above described, One and Two Above Discovery on Bear Creek, Goldfield Association, opposite 1 and 2 above and one below L. L. Bear Creek, Rich Association on Bear Creek, and adjoining 2 above Central Association, adjoining No. 1 below on Central Creek, Discovery on Central Creek, One above on Central Creek, One below on Central Creek, Fraction (Garbin) on Central Creek, Discovery Claim on Jack Creek, a tributary of

Klery and all of the right, title and [94] interest of the said mining copartnership the Klery Creek Mining Co. in and to any and all mining claims lying, being and situated in whole or in part on Rocky Creek in the Noatak-Kobuk Mining Precinct, District of Alaska.

Dated at Nome, Alaska, April 23d, 1914.

E. R. JORDAN,

United States Marshal, Second Division, District of Alaska.

[Endorsed]: No. 2349. District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Execution. Received 4th day of April, 1914. May 29. Sale Postponed to June 5th, 12, 19, 26, 29. Postponed to Aug. 3rd by Minute Order of the Court of June 20, 1914. J. F. Hobbes and W. A. Gilmore, Attorneys for Plaintiff. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 11, 1914. G. A. Adams, Clerk. By ———, Deputy. L. [95]

**[Order Relative to Motion for Extension of Time to
File Bill of Exceptions, etc.]**

*In the District Court for the District of Alaska,
Second Division.*

TERM MINUTES, General 1913 Term, beginning
January 6, 1913.

Saturday, November 1, 1913, at 10 A. M.

Court convened pursuant to adjournment. Hon.

CORNELIUS D. MURANE, District Judge, presiding.

Upon the convening of Court the following proceedings were had:

2349.

H. GREENBERG

vs.

JACK LESAMIS et al.

Mr. G. J. Lomen, on behalf of defendants, presented and filed motion for order granting twenty days' additional time to file bill of exceptions for use on hearing of motion for new trial; also affidavit in support of said motion.

Mr. Lomen also presented and filed motion for the continuance of the hearing of the motion for a new trial herein for the period of three weeks.

The Court announced that he would take up said motions at the time of hearing the motion for new trial.

**[Order Overruling Motion for Extension of Time to
File Bill of Exceptions, etc.]**

2349.

GREENBERG

vs.

LESAMIS et al.

Mr. G. J. Lomen presented and filed objections to the hearing of defendants' motion for a new trial herein at the present time. The motion being submitted was overruled by the Court. The motion of defendants for twenty days' additional time in which

to prepare, serve and file a proposed bill of exceptions which may be used on the hearing of the motion for a new trial herein being submitted, the Court overruled and denied said motion. Exception to order allowed.

The motion of defendants for a continuance of the hearing of the motion for a new trial herein for a period of three weeks being submitted to the Court, was overruled and denied. Exception to order allowed.

The motion of defendants for a new trial being submitted to the Court, the Court overruled and denied said motion for a new trial. An exception was allowed defendants to said order. Upon motion of Mr. Lomen, defendants were allowed twenty days from to-day in which to prepare, serve and file a bill of exceptions herein. [96]

**[Order Overruling and Denying Motion for an Order
Vacating Certain Orders Made November 1,
1913.]**

*In the District Court for the District of Alaska,
Second Division.*

TERM MINUTES, General 1914 Term, beginning
January 5, 1914.

Saturday, February 14, 1914, at 11 A. M.

Court convened pursuant to adjournment. Hon.
J. R. TUCKER, District Judge, presiding.

Upon the convening of Court the following proceedings were had:

2349.

GREENBERG

vs.

LESAMIS et al.

Defendants' motion for an order vacating and setting aside those certain orders made by the Court on the 1st day of November, 1913, denying defendants' motion for a continuance of the hearing of the motion for a new trial filed in this action; and to vacate and set aside the order of the Court denying defendants' motion for a new trial herein; and to reinstate and revive the said defendants' motion for a new trial filed in this action; and vacating the findings and judgment in this action; and for a new trial herein, was taken up by the Court who announced that the matters presented in said motion having been argued and presented on plaintiff's motion to strike out certain portions of defendants' said motion and being convinced that defendants' said second motion for a new trial, etc., was without merit, he would overrule and deny the same.

Opinion filed. [97]

*In the District Court for the District of Alaska,
Second Division.*

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS et al.,

Defendants.

Opinion.

The Court is asked to reopen this case on a second motion for a new trial, but I can see no justification for doing so. Section 1057, nor any other section of the Alaska law, provides for no such second motion, and section 925 has no application to this case.

In the case of Kentucky Central R. Co. vs. Smith, 18 L. R. A., page 67, and Lookabaugh vs. Cooper, 48 Pac. 99, this question is discussed and decided with reference to a statute similar to Section 1057, and I think the decisions in those cases lay down the correct rule or doctrine. I do not mean to say that there are no circumstances in which this court would reopen a case on a second motion, but this is not one of them.

The first and third grounds for the motion were disposed of by (1) the decision in the Hummel case, recently decided, and (2) by the affidavit of Mr. Hobbes, with reference to the stenographer. With reference to the second ground, and the alleged wrong or injustice upon which the defendants mainly base the second motion, namely, that [98] Judge Murane failed or refused to hear argument on the original motion, that there is no such thing as a *pro forma* decision on motion for new trial, and that it is the duty of the Court to hear argument thereon and to weigh or re-weigh the evidence in the case, etc., defendants cite the cases reported in 74 Fed. 477 and 176 Fed. 529. It is difficult to see how these cases have any bearing on the case at bar; they simply reiterate the familiar rule as to the weight

of evidence with reference to the verdict of a jury and the province of the Court *quoad* the same. I can find nowhere in the decisions that it is held that the Court must hear argument on a motion for a new trial. It may be better for the Court to do so, especially in jury cases where the evidence is adduced more particularly before and for the benefit of the jury whose particular province is to pass on the facts; in such cases it would be wiser and better for the Court to have its attention brought particularly to the evidence by argument on a motion to set aside the verdict.

In the case at bar, however, the trial was solely before the Judge, without a jury; it was a case in equity, and while there was a mass of evidence, it may reasonably be inferred that the judge had it well in mind; the trial lasted several days, and doubtless the case was elaborately and ably argued; the Judge took ample time to consider the case, for he did not render his decision until October 28th, about ten days after the trial.

Having reached the conclusion, therefore, that the second motion for a new trial should be overruled, it is unnecessary to pass on the questions raised on the motion "to [99] strike." Counsel for the defendants suggest, however, that the hearing of argument on that motion resulted in an injustice to the defence, in that it gave the plaintiff the opening and conclusion of the argument on the second motion for a new trial. But the Court is satisfied that the defence has suffered no harm therefrom. The oral and written arguments already had, and

the authorities examined since the same was filed has sufficiently advised the Court upon the facts and the law, and it would be a waste of time to hear the case further.

Dated at Nome, Alaska, February, 14th, 1914.

J. R. TUCKER,

District Judge.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Opinion. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Feb. 14, 1914. John Sundback, Clerk. By J. A. B., Deputy. [100]

*In the District Court for the District of Alaska,
Second Division.*

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN, GEORGE STANLEY and SAM SALLO,
Defendants.

Motion [for Order Quashing Execution].

Comes now the defendants above named, and move the Court for an order quashing the execution and notice of sale of the premises described in the judgment herein, and that if the same be not quashed, then that the Court make and enter an order herein postponing the sale of said premises from the 29th day of May, 1914, and for one year thereafter, or

for ten days after the filing of the mandate of the Circuit Court of Appeals for the Ninth Circuit, on the appeal to be taken herein, if said mandate shall be filed within one year.

And the said defendants further move that the said Court issue an order herein requiring said plaintiff to show cause at such time and place as to said Court shall seem just and proper, why said sale should not be quashed or postponed as aforesaid, and that in case said motion to quash or postpone should not be heard and disposed of before the 29th day of May, 1914, then that said sale be in the meantime and until the determination of said motion, postponed [101] and that service of a copy of any order or orders herein upon the said marshal shall operate as a postponement of said sale.

This motion is based upon the records and files in the above-entitled action and on the affidavit of G. J. Lomen hereto attached.

O. D. COCHRAN,
G. J. LOMEN,
Attorneys for Defendants. [102]

*In the District Court for the District of Alaska,
Second Division.*

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,
GEORGE STANLEY and SAM SALLO,

Defendants.

Affidavit of G. J. Lomen.

United States of America,
District of Alaska,—ss.

G. J. Lomen, being first duly sworn, says:

That he is one of the attorneys for the defendants above named; that said defendants, with the exception of George L. Stanley, are absent from the city of Nome where affiant resides and more than one hundred and fifty miles distant from Nome.

That said defendants are about to take an appeal from the judgment made and entered herein, on the 28th day of October, 1913; that more than sixty days exclusive of Sundays have elapsed since the entry of said judgment. That on the 4th day of April, 1914, a pretended execution on said judgment was issued by the Clerk of said Court and delivered by plaintiff to the United States marshal for the District of Alaska, Second Division, commanding said marshal to sell all [103] of the property described in the complaint in said action, in accordance with said judgment; that said marshal has given notice of such sale to be had at the front door of the courthouse in Nome, Alaska, on the 29th day of May, 1914, and will, unless otherwise directed by the order of this court, sell said premises. That said sale if made, will be absolute and not subject to redemption.

That Robinson, Magids & Company, a copartnership, or the assignee of said partnership one Philip Murphey, are by the judgment of said court aforesaid made preferred creditors. That prior to the en-

try of the judgment aforesaid, said Philip Murphey commenced an action at law to recover judgment against the Klery Creek Mining Company naming the plaintiff and defendants herein as copartners in said Company for the sum of seventeen thousand one hundred and twenty-four dollars and interest and costs, and caused to be issued and levied a writ of attachment against a part of the premises described in the complaint herein. That said action is still pending and undetermined and said attachment, unless discharged by the judgment aforesaid and herein, is still in force.

That said judgment leaves it in doubt whether the sale aforesaid is subject to or discharged of the lien of said attachment or other liens.

That said Philip Murphey is not a party to the action herein, and is not entitled to a personal judgment herein or a preference herein.

That said judgment takes no notice of other or general creditors of said Klery Creek Mining Company, or any preference to which they might be entitled, although the Court found that the defendants Stanley and Sallo were [104] entitled to a credit for and on account of assessment work performed upon said premises to the extent of twenty-four hundred dollars. That no notice of the dissolution or winding up of said partnership was given to creditors; that no receiver has been appointed, nor has the said property been taken into custody by the Court, except by said attachment.

That among the questions to be presented on the appeal herein is the question of whether the indebted-

edness found to be due to Robinson, Magids & Company, or their assignee, is due from the plaintiff herein or from the Klery Creek Mining Company; also whether the balance of twenty-four thousand dollars, to wit, eighteen thousand seven hundred sixty-one and eighty-one hundredths dollars mentioned in said judgment is due from the plaintiff herein or from the partnership estate belonging to said Klery Creek Mining Company.

That if said sale be not postponed pending said appeal the said defendants will suffer irreparable loss and injury, and will lose the benefit of their said appeal and the benefit of a reversal of said judgment would be rendered nugatory; or, if a reversal of said judgment by the Circuit Court of Appeals would have the effect of annulling and setting aside said sale such result would be disastrous to the purchaser at such sale.

Again, if said sale take place and is final, the attachment lien of Philip Murphey will be gone, and whether gone or not, the judgment of this court herein is not binding upon said Philip Murphey who is not a party to this action.

That by reason of the premises said property cannot, until the determination of said appeal, be sold at its real or full value.

That by reason of the lapse of time since said judgment was entered, it is doubtful whether a superseas [105] bond herein would prevent said sale.

Further affiant says that no order for the sale of said premises has been made or entered herein, and

no levy made by said marshal upon said property or any part thereof.

That this affidavit is made for the purpose of securing an order of this Court quashing said execution and notice of sale thereunder, and that if the same be not quashed, then that the Court make and enter an order herein postponing the sale of said premises by said marshal until a reasonable time after the filing of the mandate of the said Circuit Court of Appeals on the appeal herein.

G. J. LOMEN.

Subscribed and sworn to before me this the 20th day of May, 1914.

[Notarial Seal]

O. D. COCHRAN,

Notary Public in and for the District of Alaska.

My commission expires on the 2d day of August, 1915. [106]

Now comes the plaintiff and appears on the hearing of the motion herein, and waives order to show cause at this time or other notice and agrees that an order be made and entered postponing said sale for 30 days and until the further order of the Court on the motion herein a more formal order to be prepared and signed by the Court herein fixing date of hearing of motion June 27, 1914.

Dated May 23, 1914.

J. F. HOBBS,
Of Attys. for Plff.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants.

Motion and Affidavit and Stipulation. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. May 23, 1914. John Sundback, Clerk. By J. A. B., Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Defendants.
[107]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS et al.,

Defendants.

Opinion [on Motion to Quash Execution, etc.].

This is a dual motion (1) to quash the execution and notice of sale in the above-entitled cause, and (2) to postpone the sale of the premises or property in the proceedings mentioned from the 29th day of May, 1914, and for one year thereafter, or for ten days after the filing of the mandate of the Circuit Court of Appeals for the Ninth Circuit, on the appeal taken herein.

As to the first proposition, it appears to the Court that counsel for defendants fail to distinguish between a proceeding at law and a proceeding in equity. The motion to quash the execution, etc., is substantially to set aside the order of sale and to grant a new trial in the case, all of which was disposed of by the Court in its opinion heretofore filed. It is true

as contended for, and with reference to Mr. Freeman's work on Executions, that a motion to quash the execution may be made at any time, but this ordinarily contemplates the issuance of an execution and the levying of same in compliance with the statutory provisions and a sale as the result thereof, but this is a suit in equity, and the Court has pronounced its judgment in the case and as a result of that judgment has ordered a sale of certain property; the sale, therefore, is based upon the order of the Court and not upon the execution as provided by the statute, and before the Court can now stop the sale it must set [108] aside the order of sale, which as I have said, it has refused to do in denying the motion for a new trial.

The second part of the motion is to postpone the sale, and is in effect an attempt of the defendants to have the benefit of the writ of supersedeas which they failed to secure within sixty days, etc., after the rendition of the judgment by not complying with Section 1007 of the R. S. U. S.

The case mainly relied upon by defendants in support of their motion is *Bound v. South Carolina*, 55 Fed. 186, but that was a case in the Appellate Court, the appeal had been allowed and was pending; it was decided that the Appellate Court could postpone a sale till after the hearing and determination of the appeal although there had been no supersedeas. The sale was postponed for the period of eight months merely to await the determination of the appeal then pending. It may be well to note, however, that the court in that case, at page 188, said: "It is manifest

that if this postponement is to operate as a supersedeas, it could not be granted.” The case here is essentially and radically different from that of *Bound v. South Carolina*. This Court is now asked to postpone a sale contingent upon an appeal being obtained and for a period of twelve months from the rendition of the judgment. I have searched in vain for authority or justification for granting the motion to postpone, more so than probably would otherwise have been done but for the zeal of counsel and the insistence that my predecessor, in consequence of his hasty retirement from office, had inadvertently done the defendants an injustice. But to grant this motion would be to nullify Section 1007, R. S. U. S., or tantamount to making a *nunc pro tunc* order effectual for the purpose of a supersedeas. Such an order would operate as a supersedeas.

In the case of *Sage et al. vs. Central R. R. Co. et al.*, 93 U. S. p. 417 (decided in 1876), the Court said: “A supersedeas is a statutory remedy. It is only obtained by a strict compliance with [109] all the required conditions, none of which can be dispensed with. *Hogan vs. Ross*, 11 How. 297; *Railroad vs. Harris*, 7 Wall. 575. Time is an essential element in the proceeding, and one which neither the Court, nor the Judges, can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law.

The Court can no more give effect to a supersedeas by ordering that the appeal shall relate back to a time within the sixty days, than it can to an appeal taken after the expiration of two years by dating it back to a time within the limitation. To make a *nunc pro tunc* order effectual for such purposes, it must appear that the delay was the act of the court and not of the parties, and that injustice will not be done.”

In the same volume of the Supreme Court Reports, at page 86 (decided in 1876), in *Kitchen vs. Randolph*, it was held that it was not in the power of a justice of the Supreme Court to grant a supersedeas on a writ of error or upon an appeal, unless the writ of error was sued out and served or the appeal taken within sixty days, Sundays exclusive, after the rendition of the judgment or decree complained of; and in that very case, p. 188, the Court, while granting the motion as above stated, said: “It is manifest, that if this postponement is to operate as a supersedeas, it could not be granted. The supersedeas is a right secured by statute, and of imperative obligation on the Court, and its officers. If the provisions of the statute are complied with, the right exists. If these are not complied with, it cannot exist. Without such compliance no court can confer it.”

The opinion of the Supreme Court in *Kitchen vs. Randolph*, *supra*, containing as it does a valuable historical review of the [110] law pertaining to the general subject on which this motion is based, seems to absolutely preclude this court from granting said motion; that opinion states that Section 1007

of the Revised Statutes expresses the intention of Congress to restore the policy of the old law, which had been relaxed by the former statute 1872, and the later opinion of the same eminent judge in *Sage vs. Railroad*, *supra*, states with force the rule of necessity of strict compliance with the statute. *New England R. Co. vs. Hyde*, 101 Fed. 398, &c.

As specially applicable to this case and the refusal of this court to grant the motion asked for, I quote from the opinion of Chief Justice Taney, the only rival of Chief Justice Marshall in that exalted position; he says: "This Court has never deemed the tribunals of the United States authorized to dispense with the express provisions of the Acts of Congress regulating appeals and writs of error on any equitable ground. No such power is given them by law." *Saltmarsh vs. Tuthill*, 12 How. 389. And again in *U. S. vs. Curry*, 6 How. 113, C. J. Taney says: "It has been said that this objection is a mere technicality, and may be regarded rather as a matter of form than of substance. But this Court does not feel itself authorized to treat the directions of an Act of Congress as it might treat a technical difficulty growing out of ancient rules of the common law. The power to hear and determine a case like this is conferred upon the Court by Acts of Congress, and the same authority which gives the jurisdiction has pointed out the manner in which the case shall be brought before us; and we have no power to dispense with any of these provisions, nor to change or modify them. And if the mode prescribed for removing cases by writ of error or appeal be too strict and

technical, and likely to produce inconvenience or injustice, it is for Congress to provide a remedy, by altering the existing laws, not for the Court." For a full discussion and review of the authorities on [111] this subject, see Foster Federal Practice (4th ed.), Vol. 3, Section 510, p. 2085, et seq.

For these reasons, the motion to quash and the motion to postpone are denied.

J. R. TUCKER,
District Judge.

Dated at Nome, Alaska, July 24, 1914.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Opinion. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 24, 1914. G. A. Adams, Clerk. By J. A. B., Deputy. [112]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN, GEO. L. STANLEY and SAM SALO,
Defendants.

Motion for Confirmation of Sale.

Comes now the above-named plaintiff by Messrs. J. F. Hobbes and William A. Gilmore, his attorneys,

and upon the records, pleadings and files herein, and the return of the U. S. Marshal to the order and decree of sale, showing to the Court that on the 10th day of August, 1914, the said marshal sold by auction in the manner prescribed by law, and according to the decree and practice of this Court, all the real property of the Klery Creek Mining Company, a co-partnership comprising the plaintiff and defendants, and described in said decree; and that notice of such sale was duly given as required by law and the return of such sale was made during the same special term, to wit: 'On the 11th day of August, 1914, moves the Court for an order herein confirming said sale.

Dated at Nome, Alaska, August 28th, 1914.

J. F. HOBBS and

WILLIAM A. GILMORE,

Attorneys for Plaintiff. [113]

Service of a copy of the foregoing motion for confirmation of sale this 29th day of August, 1914, at — M., admitted.

G. J. LOMEN,

Of Attorneys for Defendants.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis, et al., Defendants. Motion for Confirmation of Sale. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 29, 1914. G. A. Adams, Clerk. By ———, Deputy. J. F. Hobbes and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. [114]

[Objections of Defendant to Confirmation of Sale.]

*In the District Court for the District of Alaska,
Second Division.*

No. —.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS et al.,

Defendants.

Come now the defendants in the above-entitled action, and object to the confirmation of the sale made by the United States Marshal of the premises described in the complaint in said action, under the pretended execution issued out of said court in said action on the 4th day of April, 1914, on the judgment entered in said action October 28th, 1913; which pretended sale took place on the 10th day of August, 1914, at twelve o'clock M., return of said execution being made by said marshal on the 11th day of August, 1914, for the reasons and on the ground following, to wit:

First: No order of sale was made by said Court as required by the judgment in said action.

Second: The pretended execution under which said sale was made, is void on its face and unauthorized by statute.

Third: No levy was made upon the property sold.
[115]

Fourth: The judgment in said action is so indefinite and uncertain as to render the execution thereof impossible.

Fifth: Said property was sold in bulk as one parcel, without reference to the attachment lien thereon, and without being freed from said attachment lien in favor of one Philip Murphey in an action pending in said court wherein said Philip Murphey was plaintiff and said H. Greenberg and the defendants herein were defendants.

Sixth: Said property at said sale, was bid in and struck off to H. Greenberg a judgment debtor in said action first above entitled, on a pretended bid of three thousand dollars, but that no money was in fact paid by said Greenberg to said marshal, except the sum of one hundred and seven dollars and seven cents, the costs of sale. That no money was paid to the clerk of said Court by said marshal as directed by the judgment in said action.

Dated at Nome, Alaska, this the 12th day of August, 1914.

G. J. LOMEN,

O. D. COCHRAN,

Attorneys for Defendants.

[Endorsed]: #2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Objections to Confirmation of Sale. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Aug. 13, 1914. G. A. Adams, Clerk. By —————, Deputy. L. G. J. Lomen and O. D. Cochran, Attorneys for Defendants. [116]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,
GEO. L. STANLEY, and SAM SALO,
Defendants.

Order Confirming Marshal's Sale.

The motion of the plaintiff for an order confirming the sale of the real property of the Klery Creek Mining Company, a copartnership comprising plaintiff and defendants, made by the U. S. Marshal for the District of Alaska, Second Division, on the 10th day of August, 1914, pursuant to the decree and order of the Court herein, heretofore signed and filed, coming on regularly to be heard, and it appearing that notice of such sale was duly given as required by law, and that the said sale was in all respects duly and regularly made, according to law and the practices of this Court; and it appearing further that the said decree and order of sale were duly returned into court at the same term hereof, to wit, on the 11th day of August, 1914; and it appearing further to the Court that thereafter on the 13th day of August, 1914, the defendants filed their objections to the confirmation of said Marshal's sale, and the Court having considered said objections and having overruled the same, and the Court having been otherwise fully advised in all the premises; [117]

It is therefore, now ORDERED AND ADJUDGED that the said sale of all the real property of the said Klery Creek Mining Company, comprising the plaintiff and defendants, as described in the said decree and order heretofore entered herein, be, and the same hereby is in all respects confirmed and approved;

And it is further ORDERED AND ADJUDGED that the said H. Greenberg, purchaser of the said real property, be let into possession thereof forthwith, and if redemption thereof be not made within the time limited by law, then at the expiration of said time of redemption, the said U. S. marshal for the District of Alaska, Second Division, execute and deliver to the said purchaser a conveyance of all the said real property.

Done in open court this 5th day of September, 1914,

J. R. TUCKER,

District Judge.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Order Confirming Marshal's Sale. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 5, 1914. G. A. Adams, Clerk. By ———, Deputy. J. F. Hobbes and William A. Gilmore, Attorneys at Law, Nome, Alaska, Attorneys for Plaintiff. Vol. #10, Orders & Judgments, page 587. C. [118]

*In the District Court for the District of Alaska,
Second Division.*

H. GREENBERG,

vs.

Plaintiff,

JACK LESAMIS, JOHN TYAPAY, ANDY GAR-
BIN, GEORGE STANLEY and SAM
SALLO,

Defendants.

Proposed Bill of Exceptions.

This cause coming on for trial before said Court, the Honorable C. D. Murane judge presiding without a jury, on the 15th day of September, 1913, on the complaint, the answer of defendants Lesamis and Garbin, the answers of defendants Stanley and Sallo, replies to said answers, the supplemental answer and cross-complaint of defendants Stanley and Sallo, and the reply thereto,—plaintiff appearing by J. F. Hobbes and William A. Gilmore his attorneys, and the defendants appearing by G. J. Lomen, their attorney, the following proceedings were had and testimony taken, to wit:

[Testimony of H. Greenberg, Plaintiff.]

H. GREENBERG, plaintiff, was sworn and testified as follows:

I am the plaintiff. I know the defendants; have known them since 1906. March 8th or 9th, in 1910, I met them at their cabin on Klery Creek—Garbin, Tyapay, Lesamis and Sam Magids and I were present. The defendants were hard up, [119]

(Testimony of H. Greenberg.)

short of money and provisions, and they asked me for credit—credit with Robinson, Magids and Company, for operating. Robinson, Magids and I are the Company last named. We had a store at Candle, afterwards we established a store at Kiana.

The defendants represented that they had made valuable discoveries on their mining claims and they showed me gold. I refused them credit, that is, Robinson, Magids & Company refused to extend them credit, and they offered to make a deal with me—they asked me to buy into their mining claims, to take a share with them—to buy an interest with them and to go ahead and operate the mines together. We finally came to an understanding at an agreed price of thirty thousand dollars. They were hard up, living on nothing but fish, and they wanted to get supplies, they offered to sell me a fourth interest in the property. They asked fifty thousand dollars in the first place, then forty thousand, then they came down to thirty thousand dollars. I told them that I have not got any money to buy property with none at all, so they decided to take the money out of the ground, from the profits of the ground, if I will give them a start to go ahead and work the ground with, that they knew they could take it out of the profits of the ground in one year; that all they wanted was to get a chance to get it opened up; so I agreed to give them two thousand dollars worth of supplies. They were perfectly willing to take the money out of the ground if they were able to get supplies to operate on, and then this balance to be taken from the profits of their

(Testimony of H. Greenberg.)

mining. I accepted that offer, I furnished them with groceries and provisions, mining tools, etc. There was to be paid six thousand dollars in all and a balance of twenty-four thousand dollars in addition to furnishing two thousand dollars worth [120] of supplies. I paid the defendants Lesamis, Tiapay and Garbin six thousand dollars by checks on the bank; they cashed these checks; the balance of twenty-four thousand dollars was to be paid when the money comes out of the profits—out of the ground from operating the mines; no time was stated at all, just when the money comes out. A memorandum or deed was drawn up by Mr. Magids. This I now hold in my hand—that is my signature, it was signed by all the others there at that time. I saw them sign it; it bears date March 19th, 1910—we were there at that time. That was the windup of our conversation, from a number of talks we had there on the creek.

Instrument with recorder's certificate offered and received in evidence, marked Plaintiff's Exhibit "A," as follows: [121]

[Plaintiff's Exhibit "A"—Agreement, March 19, 1910, Between Tyapay et al. and Greenberg.]

Klery Creek March 19th 1910

Know all men by these presents That we the undersigned John Tyapay Andy Garbin and Jack Lesamis of the Noatak-Kobuk recording district District of Alaska and H. Greenberg of Nome Ala. enter into this agreement, that for the sum of one dollar Lawful money of the United States in hand paid and other valuable services, for same services H. Greenberg is,

(Testimony of H. Greenberg.)

and shall be a full fledged partner with the above mentioned parties & have one quarter undivided interest in all claims, lodes, water rights aquired or to be aquired and owned by the above mentioned Parties. It is further agreed that H. Greenberg is to furnish the above mentioned parties with provisions from time to time up to till July 1910.

ANDY GARBIN. [Seal]

JACK LESAMIS. [Seal]

JOHN TYAPAY. [Seal]

H. GREENBERG.

Witnesseth:

SAM MAGIDS.

HERMAN BERNHARDT.

[Endorsed]: #1015. Filed for Record the 29 Day of Mar. 1910, at 3 o'clock P. M. and Recorded in Vol. 10, at Page 273, of the Records of the Noatak-Kobuk Recording District. M. F. Moran, Recorder. By _____, Deputy. 3 Folios. 5 Ind. \$2.75. Paid. M. F. Moran.

#2349. H. Greenberg vs. Jack Lesamis et al. Plaintiffs Exhibit "A." Filed Sept. 15, 1913. J. Sundback, Clerk. By J. A. B., Deputy. [122]

The form used was taken from the Miners & Merchants' Bank from book furnished to miners. Magids is not an attorney, there was no attorney nearer than Candle at that time. There was also another agreement prepared on the same day; Mr. Magids also drew that; it was signed afterwards in my presence; Herman Bernhart and Mr. Magids were witnesses.

Paper referred to with recorder's certificate introduced in evidence and marked Plaintiff's Exhibit "B," as follows: [123]

[Plaintiff's Exhibit "B"—Agreement, March 19, 1910, Between Garbin et al. and Greenberg.]

This Indenture made the 19th day of March in the year of our Lord one Thousand nine Hundred and ten between the undersigned Andy Garbin, Jack Lesamis and John Tyapay of the Noatak-Kobuk Recording District of the District of Alaska parties of the first part and H. Greenberg of Nome Alaska party of the second part Witness, That the said parties of the first part, for and in consideration of the sum Thirty Thousand dollars (\$30000.00) Six Thousand dollars \$6000.00 in lawful money of the United States of America to them in hand paid by said party of the second part The receipt whereof is hereby acknowledged and the balance of Twenty four Thousand to be paid of the first money taken out the ground hath granted, bargained, sold, remised, released and forever quit-claimed, and by these presents doth grant, bargain, sell, remise, release, and forever quit claim, unto the said party of the second part, his heirs and assigns one quarter ($\frac{1}{4}$) undivided of all mining claims located surveyed, recorded and held by said parties of the first part situated in Noatak-Kobuk Mining district district of Alaska, together with all the dips, spurs and angles and also the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, priviledges and franchises, thereto incident, appendent and appur-

tenant or therewith usually had or enjoyed; and also all and singular the tenements, hereditaments and appurtenances, thereunto belonging, or in any wise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well as in law as in equity, of the said party of the first part, of, in or to the said premises, and every part or parcel thereof, with appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part his heirs and assigns, forever warranting and defending the same against the claims of all persons, save and except the United States. [124]

ANDY GARBIN. [Seal]

JACK LESAMIS. [Seal]

JOHN TYAPAY. [Seal]

Witnesseth:

SAM MAGIDS.

HERMAN BERNHARDT.

[Commissioner's Seal]

[Endorsed]: #1016. Filed for Record the 29 Day of Mar., 1910, at 3 o'clock P. M. and Recorded in Vol. 10, at Page 274 of the Records of the Noatak-Kobuk Recording District. M. F. Moran, Recorder. By _____, Deputy. 4 Folios. 5 Ind. \$3.15. Paid. M. F. Moran.

#2349. H. Greenberg vs. Jack Lesamis et al. Plaintiffs Exhibit "B." Filed Sept. 15, 1913. J. Sundback, Clerk. By J. A. B., Deputy. [125]

(Testimony of H. Greenberg.)

Magids got this form from the same little book. We departed from Klery Creek the next day. I was not to make any charge for the provisions mentioned in the agreement and did not do so; they were part of the consideration; we charged for some small extras, if I am not mistaken. We called this the mining copartnership, the Klery Creek Mining Company. Mining operations were started on the placer claims mentioned in the complaint; the defendants hired a man by the name of Bob Fox as foreman—I was not there; I was in Nome during the summer of 1910; I went up there in the fall of 1910. Kiana is fifteen miles south of Klery. Robinson, Magids and Company established a store there in 1910; several boys had charge; Mr. Levy was one of them. After the mining stopped in 1910 and while I was there we had a little friendly talk to figure up the bills that have to be paid and about taking care of the business; we had no disagreement—not a word. The Klery Creek Mining Company had a credit at our store in Kiana. A settlement was made up between the company in the fall of 1910, Mr. Garbin and Mr. Magids being present; Lesamis and Tiapay had left for Nome to go outside; Mr. Garbin represented them. The gross proceeds for 1910, according to the books, were sixteen thousand three hundred fifty-one and forty-two hundredths dollars; the expenses were eight thousand nine hundred fifty-nine and seventy-five hundredths dollars. There was a statement of how the account stood at the close of mining operations in 1910 made out.

(Testimony of H. Greenberg.)

Mr. Garbin admitted it was correct; he was satisfied. The profits for the year 1910 [126] were seven thousand three hundred ninety-one and fifty-two hundredths dollars. The profit was divided between the three partners, Garbin, Lesamis and Tyapay. I did not get a cent because that was the agreement that we had at the time I made the deal with them. I was to give them the profits above expenses and to take up to six thousand dollars and then the balance was to be taken from the profits to pay the thirty thousand dollars, which I was to give them for the fourth interest. They made no demand or protest against this division of the profits; they were satisfied; neither of the defendants claimed or made any demand that he was entitled to one-third of the gross proceeds; there is no ill feeling or dispute between us before the fall of 1911; at the time of the settlement in 1910, there was an agreement made between Garbin and myself with reference to the work to be opened up and conducted the coming summer; they went short about two thousand dollars, Garbin, Lesamis and Tyapay, and they wanted about two thousand dollars to supply them with their winter supplies, and wanted to know if Robinson, Magids and Company would carry them for the next year; this was understood between Garbin, Magids and myself; this conversation was had at the Kiana store; at that time we arrived at an understanding or settlement of our account for the previous year; at that time Garbin paid his third part of the two thousand dollars; the other

(Testimony of H. Greenberg.)

partners did not pay their share themselves, but it was deducted. Mr. Garbin represented Lesamis and Tyapay; they had notified me that he was to represent them, that what he did was satisfactory to them; they gave him authority to act for them.

During the winter and spring of 1910 and 1911, they [127] worked, prospecting, and doing assessment work for the Klery Creek Mining Company on the claims mentioned in the agreement. Mr. Garbin was there; he was there for himself and he also was there for the other partners. I was not there myself. Garbin hired the men, Robinson, Magids and Company paid the bills, acting as treasurer employed by Klery Creek Mining Co. as a sort of clearing-house. The partnership built cabins for next summer's work, one or two cabins.

Mr. Levy kept the books for Robinson, Magids and Company, and everything they got in the way of supplies is charged up to them, and they were credited with gold-dust brought into the store.

Stewart Fleming acted as foreman in 1911; they sent a telegram to me to get them a new foreman from Nome, and I sent Fleming up; he commenced in December, 1910; he remained until they shut down in 1911 last part of August. Garbin expressed himself as being well satisfied with Fleming as foreman. They operated on No. 2 Above Star Association; that is one of the claims described in the deed, one of the partnership claims; they were digging and sluicing, building ditches, etc. I was not there myself. Tyapay was outside that summer; Garbin

(Testimony of H. Greenberg.)

was boss around there; he was foreman over Fleming, telling him what to do. He had a letter written down to me from Mr. Fleming, and I know from that; he signed orders on the store for supplies and provisions, and he sent an order for me to send men up to the creek that summer; we sent the men up as requested by him and Lesamis.

The gross output of gold from the time we started operations in 1910 until September, when we closed down in the fall of 1911, was twenty-six thousand nine hundred ten and eighty-eight hundredths dollars; the net losses was eighteen thousand two hundred eighty-two and fifty-three hundredths [128] dollars; this amount was due from the Klery Creek Mining Company to Robinson, Magids and Company, not all of it; seventeen thousand one hundred twenty-four dollars of it was so due; this claim was assigned to Mr. Murphy; that is the account he sued on; only a part of it has been paid, something like two hundred dollars; this was paid in royalties received by Robinson, Magids and Company; the rest is still due.

Frank Lesamis is another creditor of the Klery Creek Mining Company to the extent of one thousand one hundred fifty-eight and fifty-three hundredths dollars; that was for money which they borrowed from Frank Lesamis when they went to work; they got some money from Frank Lesamis to pay the bills; this was in 1911. Jack Lesamis took it from his brother—he got it from his brother and gave it to Robinson, Magids and Company for

(Testimony of H. Greenberg.)

them to realize on and pay on their account; the money he got from his brother was paid to the Robinson, Magids and Company on the Klery Creek Mining Company's indebtedness; we paid it on the indebtedness to pay horse hire this indebtedness of the Klery Creek Mining Company. I didn't close them down in 1911; I heard from Stewart Fleming that they had closed down the operations, that Garbin and Lesamis had ordered him to shut down operations and I went up the Creek; they told me they were not taking out enough to pay expenses and they decided to shut down; they never mentioned a word about, or denied or disputed that I was one of the partners or owner of a fourth interest in all these claims on the creek, and never said a word about the money we had furnished them or for the credit they had had for the operation and mining during the summer, never said a word about [129] being responsible for the debts. They was to go on down and make out the papers and make out a mortgage on the property and a note to Robinson, Magids and Company, and get money to pay off the indebtedness.

Lesamis, Garbin and Fleming, Ed. Fleming and Stuart Fleming and I were there when this conversation took place. We did not exactly know how much they were indebted, but estimated it at about fifteen thousand dollars, which they were to get from Robinson, Magids and Company.

Garbin and Jack Lesamis had the gold that was taken out during the summer of 1911; Garbin kept

(Testimony of H. Greenberg.)

it in his strong-box in his cabin. He brought it to Robinson, Magids and Company—to our agents down there. Andy Garbin had the key to the strong-box on the claim out there. He turned the gold over to me; I took it out to Robinson, Magids and Company's store at Kiana; he said to me, "Take it and pay up the bills." The workmen there on the creek demanded their wages, so they gave orders on Robinson, Magids and Company that they should pay the wages, and they did.

We started to go down to Kiana and make out the papers and give the notes to Robinson, Magids and Company and raise the money on the mortgage. They did not dispute their liability for their proportionate part of the expenses until this suit was commenced. We met in Kiana; in the meantime they turned over their property to Sallo and George Stanley, they so informed me; they said nothing about what they were going to do about their indebtedness; they said they intended to have nothing more to do with the ground; that they had no money and nothing to eat—that they were through with it; [130] they decided they would not operate any more for themselves, so they decided they would let a lot of lays to different people; lays were let to pay bills, collect the royalties and pay bills of Robinson, Magids and Company's indebtedness; that is the reason the lays were let; about ten leases were let, I think; this is one of the instruments executed at that time. This is my signature and the signature of the partners; Ed Fleming and Stuart Fleming

wrote these leases; the leases were on different claims; one or two on one claim—all the leases were signed in the same manner as this one, in the partnership name.

Paper referred to received in evidence marked Plaintiff's Exhibit "C," and is as follows: [131]

[Plaintiff's Exhibit "C"—Agreement, September 1, 1911, Between Greenberg et al. and Boskovitch et al.]

This agreement made & entered into this 1st day of Sept. 1911, by and between H. Greenberg, J. Lasamis, Andy Garbin, John Tapay, by H. Greenberg, his attorney in fact, parties of the first part, Lessees, and Mike Boskovitch and Paul Krietz, parties of the second part, Lessees, Witnesseth:—

For & in consideration of the rents, royalties and other consideration hereinafter mentioned, the parties of the first part hereto, do hereby lease to the parties of the second part, that certain portion of No. 1 Above on Klary Creek, tributary of Squirrel River, in the Kobuk Noatak Recording District of Alaska, more particularly described as follows:—

Commencing at a point in the wing dam where a blazed post is located, said post marked S. E. Cor of Lay, and running thence upstream along the wing dam continuing upstream 20 ft. (twenty feet) from the westerly bank of the island to the head dam, which is located on the lower end of No. 2 Above, 2nd parties to have the right to use the head dam thence westerly to the N. W. Corner of No. 1 Above, thence southerly along the west side

O K
E.E.F.
O K
J.W.S.

line of No. 1 Above to a point opposite the above mentioned blazed post in the wing dam, thence easterly to the place of beginning.

Subject to the following conditions

1st to have and to hold said demised premises with the appurtenances, unto the said lessees from the date hereoff Sept. 1st 1911 until Oct. 1st 1913, unless sooner forfeited or determined through the violation by the said lessees of any covenant or agreement hereafter contained.

2nd The parties of the 2nd part to pay to the parties of the 1st part 20% (twenty per cent) as rent and royalty of all the gold or other precious metals extracted from the premises during the first year of this lase or until Sept 1st 1912 and 25% (twenty-five per cent) as rent and royalty of all the gold & other precious metals extracted from the premises during the bal of the life of this lease, or up to Oct. 1st 1913. [132]

3rd To allow the lessors and their agents to at all times enter upon and into all parts of the said premises for the purpose of inspection and to be present and to assist at all cleanups and the retorting of amalgam and weighing of same, and to give said lessors or their agents due notice of each cleanup before it is made.

4th Parties of the 2nd part not to locate or record the said premises and not to allow any person or persons not in privity with the parties hereto to take or hold possession thereof under any pretext whatever during said term or to sublet any portion thereof

without the written consent of the parties of the first part

5th It is further agreed that should the parties of the second part fail to work on the said premises for a period of 60 days (sixty days) during the winter months, or during a period of 30 (thirty days) during the summer months, it shall be considered a forfeiture of this lease. Continuous work being the essence of this agreement.

6th. Parties of the second part agree to record proof of labor at the office of the recorder at Kiana for each year during the term of this lease.

It being expressly understood and agreed that upon the violation by said lessees of any covenant or agreement herein contained this lease and the terms thereof shall at once become forfeited and determined and the lessor may at once with or without process of law, enter into the possession of said premises and remove any and all persons found thereon.

It is further agreed that upon the expiration of this lease, all ditches and permanent improvements made upon the premises by the lessees shall become the property of the lessors without payment or further expense to them.

In Witness Whereof the said parties hereunto have set their hand and seal in duplicate the day &

(Testimony of H. Greenberg.)

year first above written. [133]

H. GREENBERG. (Seal)

JACK LESAMIS. (Seal)

ANDY GARBIN. (Seal)

JOHN TAPAY. (Seal)

By H. GREENBERG,

His Atty. in Fact.

MIKE BOSKOVICH. (Seal)

PAUL KRETS. (Seal)

Signed and sealed in the presence of

E. E. FLEMING,

W. S. FLEMING,

Witness. [134]

Department of Justice,

Second Division, District of Alaska,

J. W. Southward,

United States Commissioner,

Recorder Noatak-Kobuk District, Kiana, Alaska.

Kiana, Alaska, ———, 191——.

Filed for record Sept. 5th, 1911, 9 A. M. M. F. Moran, Recorder. J. W. Southward, Deputy.

The foregoing is a true and correct copy of agreement as filed for record in Vol. 13, at page 127 of the records of the Noatak-Kobuk Recording District.

[Commissioner's Seal] J. W. SOUTHWARD,

Recorder.

[Endorsed]: #2349. H. Greenberg vs. Lesamis et al. Plaintiff's Exhibit "C." Filed Sept. 15, 1913. J. Sundback, Clerk. By J. A. B., Deputy. [135]

The leases were all signed about September 1st, 1911, on the part of the Klery Creek Mining Com-

(Testimony of H. Greenberg.)

pany; they were all the same royalty only on different claims. The deed from Garbin to Stanley, from Lesamis to Sallo, is dated September 2nd, the following day. I demanded a mortgage preparatory to paying the indebtedness; they said they had sold their interest in the property, and that they were not going to have anything more to do with the mining ground; that is the first time I had any disagreement with them. I met Stanley and Sallo about that time; they came to the store and said they had bought out Lesamis and Garbin and said they owned the partnership at that time. I told them to pay up the indebtedness, but they said they had nothing to do with the old debt or the old partnership affairs; I said, "I expect then we will have to commence a lawsuit." Stanley says, "Yes, it looks like it." Mr. Levy was present. Neither Garbin, Tyapay or Lesamis have complied with the settlement between us or paid the account between us, they refused to pay their account to us, and refused to go ahead with the settlement of their accounts; we never had an accounting.

Tyapay and Lesamis had been outside during the winter of 1910 and 1911, they returned to Nome in the spring of 1911.

This instrument is a deed which they gave to me here in Nome at that time, it bears date June 17th, 1911.

Paper referred to received in evidence marked Plaintiff's Exhibit "D," being as follows: [136]

[Plaintiff's Exhibit "D"—Deed, June 17, 1911,
Tyapay et al. to Greenberg.]

THIS INDENTURE, made the 17th day of June in the year of our Lord one thousand nine hundred and eleven Between John Tyapay, Andy Garbin, and Jack Lesamis the parties of the first part, and H. Greenberg, the party of the second part,

Witnesseth: that the said parties of the first part, for and in consideration of the sum of Thirty Thousand (\$30,000.00) Dollars, Gold Coin of the United States of America, to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released and forever quit-claimed, and by these presents do grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part, and to his heirs and assigns an *undivided* one quarter interest of in and to all mining claims, mining ground and mining property, located, owned, surveyed or unsurveyed, recorded or unrecorded, held, owned or claimed by the said parties of the first part, and being situate in the Noatak-Kobuk mining and recording district, District of Alaska; the interest hereby conveyed being an undivided quarter interest of each of said parties of the first part, and a quarter interest in the whole of said claims and mining property. (\$6,000.00 of said consideration has been paid in cash and hereby acknowledged; the remaining \$24,000.00 is to be paid from the proceeds of said mining ground, from the gross output, and from the first output, after necessary expenses of operating said

ground have been deducted; all the first gross output shall be applied to the payment of said \$24,000. after necessary expenses of operating have been deducted.)

TOGETHER with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appellant and appurtenant, or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining and the rents, issues and profits thereof; and also, all the estate, [137] right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of in or to the said premises, and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD, all and singular the said premises, together with the appurtenances and privileges, thereunto incident, unto the party of the second part, and to his heirs and assigns forever.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

JOHN TYAPAY. (Seal)

JACK LESAMIS. (Seal)

Signed, sealed and delivered in the presence of

J. F. HOBBS,

JAS. W. BELL,

As to Signature of John Tyapay.

J. F. HOBBS,

EUGENIA LESAMIS,

As to Signature of Jack Lesamis. [138]

United States of America,

District of Alaska,—ss.

On this 17th day of June A. D. one thousand nine hundred and eleven, personally came before me J. F. Hobbes, a Notary Public in and for said District, the within named John Tyapay, to me personally known to be the identical person described within and who executed the within instrument, and they acknowledged to me that they executed the same freely, for the uses and purposes therein mentioned.

WITNESS my hand and seal this 17th day of June, 1911.

[Notarial Seal]

J. F. HOBBS,

Notary Public in and for the District of Alaska.

United States of America,

District of Alaska,—ss.

THIS IS TO CERTIFY that on this 8th day of July, 1911, personally came before me, the undersigned notary public in and for the District of Alaska the within named Jack Lesamis, to me personally known to be the identical person described within and who executed the within instrument, and he acknowledged to me that he executed the same freely, for the uses and purposes therein mentioned.

WITNESS MY HAND AND SEAL this 8th day of July, 1911.

[Notarial Seal]

J. F. HOBBS,

A Notary Public in and for the District of Alaska,
Residing at Nome, Alaska.

[Endorsed]: #1554. Deed of Mining Claim. John Tyapay, Jack Lesamis, to H. Greenberg. Dated ———, 191—. Recorded at the Request of Mr. Levy Sept. 16, A. D. 1911, at 35 Min. Past 1 o'clock, P. M., in Vol. 13 of Deeds, etc., at Page 161, Records of Noatak-Kobuk Recording Precinct. M. F. Moran, Recorder. By J. W. Southward, Deputy Recorder. 7. F. 5. Ind. \$3.45.

#2349. H. Greenberg vs. Lesamis et al., Plaintiffs' Exhibit "D." Filed Sept. 15, 1913. J. Sundback, Clerk. By J. A. B., Deputy. [139]

Witness Greenberg was temporarily excused.

[Testimony of Hugo Eckhart, for Plaintiff.]

HUGO ECKHART, sworn and testified for plaintiff:

Direct Examination by Mr. GILMORE.

My name is Richard Hugo Eckhart. My business is mining; for the last three years have resided at Klery Creek and Nome. I am acquainted with the parties to this lawsuit. In 1911 I was working a lease on the Star Association; about July 2d, 1911, I had a conversation with defendant Garbin on No. 1 Above the Star Association about getting men to work for me. I asked him if he would not let us have some men for a day or two. He told me I would have to see his foreman, Stuart Fleming; that

(Testimony of Hugo Eckhart.)

is what he said; I did; Garbin was looking after the work on No. 1. I would call it superintending. He was doing work. He appeared to be telling Stuart Fleming what to do. I have no interest in the case.

Cross-examination by Mr. LOMEN.

I worked on the Star all summer about one-half a mile from No. 1; we visited back and forth. I was surely up to No. 1 a dozen times. I was visiting the boys. I did not know that there was any dispute about a partnership. When Garbine said "My foreman," it just simply seemed to me that Garbin had more authority than Fleming. We had had quite a few conversations; most of the boys on the creek all know that he had more authority than Fleming. I just heard this amongst the boys. I don't remember any person who said so. I knew Greenberg was working as a partner with the other boys. I don't know how I found out that he was a partner. I heard about the agreement when Greenberg bought in—bought in as a partner, that is what I mean. I don't remember that Levy told me that Greenberg controlled the works. I don't remember that Fleming told me that he was employed by Greenberg. We Discovery boys understood that Greenberg was working the ground with the other boys. I don't remember that Garbin told me that Fleming would only take orders from Greenberg. There was [140] more or less trouble between Garbin and Fleming. I remember that Fleming was complaining about Garbin. I heard something to the effect that Greenberg was paying expenses. I only know that Garbin at

(Testimony of H. Greenberg.)

one time referred to Fleming as his foreman. That is all I know about the matter.

Tuesday, October 16th, 1913.

**[Testimony of H. Greenberg, for Plaintiff
(Recalled).]**

GREENBERG on the stand for further direct examination:

I have a general power of attorney from Tyapay; that is the signature of John Tyapay.

Paper referred to received in evidence, marked Plaintiff's Exhibit "E," as follows: [141]

**[Plaintiff's Exhibit "E"—General Power of
Attorney—Tyapay to Greenberg.]**

KNOW ALL MEN BY THESE PRESENTS

That I, John Tyapay of Nome, in the District of Alaska, have made, constituted and appointed, and by these presents do hereby make, constitute and appoint H. Greenberg of Nome in the District of Alaska, my true and lawful attorney, for me and in my name, place and stead, and for my use and benefit to ask, demand, sue for, recover, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me and have, use and take all lawful ways and means in my name, or otherwise, for the recovery thereof, by attachments, arrest, distress, or otherwise, and to compromise and agree for the same, and to make, sign, seal and deliver acquittances, or other sufficient discharges for the same, for me and in my name, to bargain, contract,

agree for, purchase, receive and take lands, tenements, hereditaments, and accept the seizin and possession of all lands, and all deeds, and other assurances in the law therefor, and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements and hereditaments, upon such terms and conditions and under such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate and in any and every way and manner deal in and with goods, wares and merchandise, choses in action and other property, in possession or in action, and to release mortgages on lands or chattels, and to make, do and transact all and every kind of business of what nature and kind soever. And also for me and in my name, and as my act and deed, to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage judgment and other debts, and such other instruments in writing, of [142] whatever kind or nature, as may be necessary or proper in the premises:

Giving and Granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, hereby ratifying and confirming all that my said Attorney shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof the said party of the first part has hereunto set his hand and seal this 17th day of June, 1911.

JOHN TYAPAY. Seal.

Seal

Seal

Seal

Seal

Signed, sealed and delivered in the presence of

J. F. HOBBS,

JAS. W. BELL.

United States of America,

District of Alaska,—ss.

On this 17th day of June A. D. one thousand nine hundred and eleven personally came before me J. F. Hobbes a Notary Public in and for said District the within named John Tyapay to me personally known to be the identical person described within and who executed the within instrument, and acknowledged to me that he executed the same freely, for the uses and purposes therein mentioned.

Witness my hand and seal this 17th day of June, 1911.

[Notarial Seal]

J. F. HOBBS,

Notary Public in and for the District of Alaska.

[143]

[Endorsed]: #1542. Power of Attorney General. John Tyapay to H. Greenberg. Dated June 17th, 1911. Filed and Recorded at Request of H. Greenberg. Sept. 5th, A. D. 190—, at — min. Past 9 o'clock A. M., in Volume 13, of Power of Attorney, at Page 143, Records of Noatak-Kobuk Recording

(Testimony of H. Greenberg.)

District, District of Alaska. M. F. Moran, Recorder.
By. J. W. Southward, Deputy Recorder. 6-4-\$3.45.

#2349. H. Greenberg vs. Lesamis et al. Plaintiff's Exhibit "E." Filed Sept. 16, 1913. J. Sundback, Clerk. By J. A. B., Deputy. [144]

Tyapay said, "These people can say what they please, but I will stand by you," referring to me; that was subsequent to the date when the deed was made out in the presence of him and Lesamis; Lesamis signed it in June, at the same time; Garbin was not present at that time,—he was in Kiana; this was in the summer of 1911—it was not signed by him later; it was presented to him for signature in July; he never signed it, however. I was in Nome all summer in 1911. I received from these gentlemen, my partners up there, a telegram; this is the telegram; I received it about July 7th.

Telegram marked Plaintiff's Exhibit "F" for identification, being as follows:

**[Plaintiff's Exhibit "F"—Telegram, July 7, 1911,
Garbin to Greenberg et al.]**

**"ALASKA TELEPHONE & TELEGRAPH
COMPANY.**

RECEIVED.

Candle, Alaska, July 7, 1911.

Greenberg Lesames & Tyapay, Nome.

Send forty men to our camp on Klery. No men to be had here.

ANDY GARBIN by H. ROBINSON."

I complied with the telegram. This is a letter

(Testimony of H. Greenberg.)

from Tyapay and Jack Lesamis to me. That is the signature of both of them; I received it about October 20th, 1910. I am familiar with the handwritings of Tyapay and Lesamis—their signature.

Paper referred to received in evidence and marked Plaintiff Exhibit “G,” being as follows: [145]

**[Plaintiff’s Exhibit “G”—Letter, Oct. 20, 1910,
Tyapay and Lesamis to Greenberg.]**

Nome Alaska Oct. 20/1910.

Mr. H. Greenberg:

Gentlemen: I hereby writte you a few lines. That we are going outside for this Winter, we will be glad to see you in Nome before we leave this Town but looks as we could not. Well: but can not helped. But the same time I let you know: we going outsite, and you will be round here, or round Kobuk. Will you please? give it hand to Andy Garbin for doing all they assessments work, and to looke that every claim will be Recordet, and that every Claim will have done nofe work, and all they Prospects And you tell to Mr. R. H. Fox that, let im stard early in neckst spring that would loose no time as this we dit this last spring. And if you not like to Higher, R. Fox, and if you have some good man, go to it. We are intend to come early in the spring. Anything you will needet we ill be

(John Tyapay, Pittsburg Pa. U. S.)

(Jack Lesamis San francisko California U.
S.)

(Testimony of H. Greenberg.)

Also we gadet some Money from Candle

J. Lesamis \$1,000.

dollars

J. Tyapay \$2,000.

You can not to be mate, that we done it because we have to; we wan to going for the South (like a)

Do best you can if you please and send up all the provision we Ordered from your store

Yours Partners

JOHN TYAPAY.

JACK LESAMIS.

Good Bay

[Endorsed]: #2349. Greenberg vs. Lesamis. Plaintiff's Exhibit "G." Filed Sept. 16, 1913. J. Sundback, Clerk. By J. A. B., Deputy. [146]

When I received this letter I told them to send up plenty of supplies for operating all summer; they had ordered goods from our store—about two thousand dollars worth; these were the goods I mentioned yesterday. This money that is referred to in this letter, which was one thousand dollars to Lesamis and two thousand dollars to Tyapay, received from Candle. I know they got that money from Robinson Magids and Company; they drew about six thousand dollars before they left Kiana; some of it was the money which came from the operations of the claims; we trusted them for the balance. I received this letter in John Tyapay's hand writing dated February 20th, 1912.

The paper referred to and received in evidence marked Plaintiff's Exhibit "H," being as follows:
[147]

**[Plaintiff's Exhibit "H"—Letter, Feb. 20, 1912,
Tyapay to Greenberg.]**

Feb. 20, 1912.

from John Tyapay
to Mr. H. Greenberg

Gentlemen: I writte you this few lines, it you knows that, I gade promise from you, that you will writte to mi last fall on the closing seasson what was new up there, how you people comen up, it is how you doing up there, and beside this Two Tousand Dollars, I was expecting to get, on the Mordgade, One tousand dollars to Hungary and One tousand to the first National Bank of Pittsburg. But I can not get even letter from you, only I gade Telegraph from lowyers from Mr. Cohram and Mr. Lowmen that is suit entred to dissolve (Brek) Partnership. That a bed news, when you people can not to gade long. Who is that fellow who stard the trouble?

Mr. H. Greenberg you understand, I give you my Power of Attorney so you do how best you can for me, and for yourself, also for the anothere boys. it will be best if can be everithings together as we have stardet. But if the suit will come up to dissolve (brek) the partnership, then you take care of my interest until I come up there I expect to be there this summer. Or, if you, or anybodi van to buy my interest in the Kobuk Mining District, I willing to sell, for the price of \$10,000.00 Ten tousand dollars,

(Testimony of H. Greenberg.)

it worth \$30,000 any time. But when the trouble come up betwen you fellows, so if you, or any Body, pay to the First National Bank of Pittsburg for my credit \$10,000.00 Ten tousand dollars until 1st of July 1912 I will send Deed from my interest in the Kobuk-Noatak Mining District, District of Alaska, I will send you another letter with the first Boat.

Best Regard to the another friends, Yours

JOHN TYAPAY.

Good Bay

Europe, Hungary.

[Endorsed]: #2349. Greenberg vs. Lesamis et al. Plffs. Exhibit "H." Filed Sept. 16, 1913. J. Sundback, Clerk. By J. A. B., Deputy. [148]

I have not heard from Tyapay since. I never had any misunderstanding with Tyapay about the partnership; he has not been here since 1910. When this partnership was formed the assets of the company was the mining property no personal property. I refer to those claims mentioned in the complaint; at the present time the assets of the company are mining property—mining claims—a few cabins and tools, sluice-boxes, etc., very little mining equipment; these assets do not include any money or gold-dust that I know of.

Mr. Garbin never made any charge for his time for 1911 that I know of, because he was interested in the mining that is what he was supposed to do, to attend to the mining and put in his time mining for the company. I never put in any claim for my time or personal expenses going to and from the mines in

(Testimony of H. Greenberg.)

1911. There was no understanding or agreement that I would put in my time for nothing.

Cross-examination.

My business is mining and mercantile business. I am not mining now. In 1910 I mined the Bessie in this district the Nome district. My partners mined with me in other places; then I mined with my partners on Klery Creek in 1910 and 1911; the same company mined at Kiana; I have an interest in the stores, the Bessie in Nome; I am interested in stores in Candle, Deering, Keewalik and Kiana—interested with Robinson, Magids and Company and the Bessie Company; that store at Kiana was established in 1910, my time is given to these various businesses.

Q. Now, you say in your partnership agreement that you and the defendants in this case, your partners, [149] were to put in all of your time?

A. Well, all that is necessary, I am to put in, not all of my time, nobody can give all of their time, but I am to give all of my time what is necessary and not make any charge.

I am to have an interest in the company and I am to put in all of my time what is necessary looking after that interest, but they were to devote all of their time to the company and I was to devote all of my time to the company when I can spare the time. At the time we made the agreement that is what they was supposed to do, that they would devote their time in looking after the property; they were under no obligations to do so.

I heard of the strike on Squirrel River about

(Testimony of H. Greenberg.)

Christmas, I was in Nome; I went to Candle and Deering; Mr. Magids and I talked about the Squirrel River strike and so we said we would go up and see what it amounted to; we went to the camp on Klery Creek. I knew Tyapay, Lesamis and Garbin several years before. I met the boys in their camp there and we were talking over, just general talk like about the strike. I don't remember that I offered to buy an interest in their claims at that time. I don't remember ever trying to get a half interest in their properties. I don't remember that there was any talk between us about sixty thousand dollars for a half interest; I didn't say I wanted to buy in with them; they offered to sell to me; I don't remember what they offered to sell for first; of course, they asked me everything they could if they thought I would pay it. Sam Magids was with me; I don't remember that Sam Magids first drew one agreement based on a half interest; I don't remember every thing that happened [150] it is too long ago; maybe he first drew up an instrument based on a half interest, and subsequently we agreed upon a quarter interest in the property; I don't remember. I got a deed from them that time; the deed is in evidence; there was another agreement, also in evidence, made at the same time; I don't remember which paper was made out first; the agreement was reached before either of the papers was made out.

Q. Now, what was the conversation between you people at that time in regard to the partnership? Just give us the conversation.

(Testimony of H. Greenberg.)

A. The conversation was between us there, all of us, that they wanted some money to go ahead and get supplies; they were living on fish and flour, that was all they had to eat, and they wanted money, they wanted credit.

Q. I am asking about the conversation, what did they say?

A. Oh, I don't remember the conversation, it is too long ago for me to remember these things. They were talking so much up there I couldn't tell you what was said back and forth, what they wanted and what they needed most; they were telling me that they wanted money to go ahead, that they couldn't open up the ground unless they got some money; we were talking there amongst us two days and a half, about all night; I couldn't tell you everything that was said.

Q. Now, this short agreement was intended to embody all the results of that conversation, wasn't it?
[151]

A. I don't remember which one, if either of them said anything about that; the agreement is the agreement the way it was stated there, that I was to give them about two thousand dollars worth of supplies up to July 1st, enough to start operating on and six thousand in cash; about two thousand in supplies and six thousand in cash. I told my boys to furnish about two thousand dollars worth of supplies, there was no store in Kiana as yet. I don't know that Jack Lesamis had considerable money and three or four tons of provisions at the time our agreements were

(Testimony of H. Greenberg.)

made; he may have had without me knowing anything about it; I will not swear that he didn't; they represented to me that they had no provisions and no money; I don't know what money Garbin or Tyapay had at that time; under our agreement I was to get an interest in what they acquired in the future; they were not to have an interest in what I acquired. They staked me in on the Oregon Claim, that was not under that agreement they just staked me in. I got an eighth and Magids got an eighth in the Oregon Claim.

I don't know if the Klery Creek Mining Company signed any of the leases. I wanted my share of the royalties to be collected under the leases; it belongs to the company; the ground belongs to the company. I know that the company signed it or the individual parties signed it. Mr. Magids is interested in everything Robinson, Magids and Company own; he is one of the partners. Robinson, Magids and Company are interested with me—in business with me; they are not interested with me in these mining claims, not in the [152] papers so far. I hold no interest in trust for them; I don't know what they expect to get; I have not made any promises to them; I have not accounted to them for any profits; there were certain profits of the Klery Creek Mining Company growing out of the mining in 1910.

Now, these seven thousand dollars profits in 1910 were divided up between Lesamis, Tyapay and Garbin, it was paid in money, I think; Robinson-Magids got the gold-dust I suppose. I don't remember

(Testimony of H. Greenberg.)

where they sent it; I don't remember that I took it to the Miners & Merchants' Bank or that the Bank gave me credit for it; I don't remember where that money went to; I don't remember whether I individually and personally got credit for it; I don't remember every time I sell some gold-dust.

(Tyapay) Lesamis was paid a thousand dollars by check from the Candle Store; Robinson, Magids and Company sent a telegram and the Bank paid it. Tyapay got two thousand, that is mentioned in the letter, that was his share of the profits in 1910, approximately anyhow. We completed our settlement and arrived at this dividend in that way; we divided up and gave him credit for that much; I don't know that he ever got any more from his profits. Lesamis got one thousand cash from Robinson, Magids and Company; he got a check on the Bank here, that is mentioned in Tyapay's letter; Garbin got two thousand dollars, thirteen hundred in cash, and he got some seven hundred dollars that he would put up to his account for the company for operating in 1911; that is my construction. They were all to get two thousand dollars apiece; they were all supposed to get two thousand; Garbin got thirteen hundred dollars and seven hundred dollars was supposed to be left for future operations in 1911; that is the reason that he [153] got two thousand, but he agreed that he would draw only thirteen hundred and he would leave the balance to his credit; he was not going outside and he agreed to leave that balance to his credit so he could have it here when he started operations

(Testimony of H. Greenberg.)

in the spring; Robinson, Magids and Company agreed to carry the balance on the books to his credit and he would take it out in the spring.

Robinson, Magids and Company acted as agents; they took the gold-dust and paid the bills; somebody had to credit them and keep track of it to help them get started in the spring. Tyapay, Lesamis and Garbin made that agreement before they left; they made it with me personally; Lesamis got more than one thousand dollars out of the profits, he got it charged up to him seven hundred dollars and he took it and gave it to Martin Moran, that was a part of his profits; I don't know that the Klery Creek Mining Company had anything to do with this seven hundred dollars; we charged it to Jack Lesamis; Robinson, Magids and Company, because he took the money from the company; Jack got his money in Nome. There must have been some of the equipment left over from 1910; they ordered things right along; they must have got all new things in 1911; what was left over must have been used up in 1911.

At the time of the settlement in 1910, I had no share; I had got a fourth interest if any profits were made; no profits were made the first year, because the agreement was that they were to get the profits, that is, that they were to get all the profits that was made and the twenty-four thousand dollars was to be paid out of the profits that came out of the ground; that was the agreement that was made in the first place, they were to go to work working the next [154] year just the same as they had the year

(Testimony of H. Greenberg.)

before; whatever was left of profits was to be paid to the respective parties after payment of debts, and out of the operations the following season; the profits of 1910 were paid over, what they did not pay they left over for supplies for the next year; they were supposed to mine again the future years; they left this balance with Robinson, Magids and Company; the books of Robinson, Magids and Company will show that. Tyapay, Garbin and Lesamis did not give Robinson, Magids and Company or me any written authority to take this balance; they did not leave it with me, but they were to take it and it was to be used among the mining partners for subsequent operations; Robinson, Magids and Company held that balance by mutual agreement with Lesamis, Garbin and Tyapay; this agreement was made at the Kiana Store before the gold-dust had been sent to Nome; the Miners & Merchants' Bank if they received the gold-dust would give credit to whoever deposited the gold-dust; they gave me credit probably, or they may have charged me, or any other mining claim, or any other person that gave the gold-dust to them—anybody that was doing business with them; I don't remember this particular transaction myself.

I never told Lesamis that I was going to get out of the company, and that I was going to mine on my own account; I told him that I was not doing it for a pleasure trip, that [155] I had spent all my money I was going to for pleasure, but I told him that next year I hoped to get in better and take out more money; that I wanted to see what was in the

(Testimony of H. Greenberg.)

property; I never told Garbin that I was mining on my own account, nor Tyapay.

I brought Stuart Fleming from Nome, but I employed him for Mr. Garbin himself.

The Klery Creek Mining Company bought all the new tools and mining equipment that we used in mining, and I don't know what individual bought them or ordered them; I gave Stuart Fleming no instructions in regard to what he should do there in 1911; I told him the outline of what Mr. Garbin was going to do; told him that we was all together mining together and that Mr. Garbin was there on the ground looking after the company's interest; I did not tell him not to take any instructions from Mr. Garbin. Garbin exercised authority in regard to the mining by Mr. Fleming if he wanted to, I guess, I was not there; I don't remember that I took the gold-dust to Nome or charged a hundred dollars for doing so.

I was supposed to pay, under the agreement, thirty thousand dollars, but it was understood that we were to take it out of the ground first.

Q. The others were not to contribute in any way, shape or manner to this amount?

A. To the thirty thousand dollars, no, they didn't have to pay me anything towards that, because simply this twenty-four thousand dollars, under our agreement, this comes out from the ground, out from the profits; out from the Klery Creek [156] Mining Company, out from the ground which they have already and out from any ground they locate, any property in that district which they have.

(Testimony of H. Greenberg.)

Q. What property did you understand the Klery Creek Mining Company had?

A. Well, they have some mining claims, a whole lot of mining claims and some cabins around there, and I think nothing else.

Q. Now, is the partnership to pay twenty-four thousand dollars, or is H. Greenberg to pay twenty-four thousand dollars?

A. Nothing until it comes out of the ground.

Q. Well, is it Greenberg's ground or the partnership ground?

A. The ground which is located by Jack Lesamis, Tyapay and Garbin—all of the partners. Until the ground has paid for itself it is all in the partnership and after it comes out of the profits of the ground it is to be paid for twenty-four thousand dollars out of the profits, out of all the ground belonging to this partnership, that was the agreement made.

Q. Now, what was the language used by these people which in any way warranted any such results as that?

A. The language was simply that they were supposed to get two thousand dollars worth of supplies.

Q. Now, cut the supplies out—the supplies had nothing to do with the thirty thousand. [157]

A. It certainly did, that was a part of the agreement. They were to get two thousand dollars, or about two thousand dollars worth of supplies, and they gave an order to Mr. Magids when we left there, that they were to get these supplies which was to be shipped to them from Candle, because this was in the winter

(Testimony of H. Greenberg.)

time and they were short of provisions; then six thousand dollars was to be paid to them out of the profits, whatever was made out of the first season's profits, and this twenty-four thousand is supposed to be paid out when it is taken out of the ground; each one was to go ahead and go to work and take the money out of the ground and pay for labor; these supplies were free of charge of all expenses at the start, but each one of the partners was supposed to put in his labor taking the money out, and then if anything is left from the profits after all expenses were paid, what is left they get all of the profits up to the amount of twenty-four thousand dollars; I don't get a cent until after the twenty-four thousand dollars is paid to the other partners. Afterwards we are to be equal partners in everything if any profits comes out of the ground; that was it in plain English.

Q. Now, you have not told me yet what was said in order to produce this result. Will you state what was said by the parties there themselves?

A. It was to be paid from the ground; no partnership whatever. It was to be paid from the ground; the [158] simple agreement was that if the money comes out from the ground.

Q. Whose ground?

A. Lesamis, Tyapay and Garbin's.

Q. And Greenberg's?

A. Greenberg had no ground at that time—I had no ground at that time to give them; I didn't give them any ground; but after I got my interest they are to get twenty-four thousand dollars from the

(Testimony of H. Greenberg.)

profits when it comes out of the ground.

Q. That is the agreement?

A. Yes, that is the agreement.

Q. You had no deed?

A. I should have a deed; I didn't become a partner until the money is turned over to them.

Q. When did you become a full-fledged partner?

A. I don't know what you mean. I was a partner, of course, in their mining operations, but I did not get any of the profits out of the ground during the first year. I had a right to my share of the profits but I did not take one cent, because we had agreed that I was to give this first money to them because Lesamis and Tyapay told me that they were going outside; they wanted to take their share of the profits to go outside and I never took a cent. Tyapay got a loan from me of three thousand dollars,—in the fall of 1910. I told him I would deduct it out of the balance of his profits—of his share of the profits. I got a mortgage; he got only one thousand dollars. I got a mortgage and foreclosed it, the amount of the foreclosure was three thousand seven hundred and fifty-one and costs—I [159] suppose it was; I don't know. Tyapay's interest was sold under the mortgage on June 26th, 1912; I don't understand much about these matters; I left that to Mr. Hobbes to look after for me. It was bought in for me and the judgment satisfied in full. I must now own Tyapay's interest. I have said that I paid him one thousand dollars and took a mortgage for three thousand, that I got judgment for three thousand seven

(Testimony of H. Greenberg.)

hundred and fifty-one dollars. I have his power of attorney, March 21st, 1912, and June 26th, 1912; I had it all that time.

Lesamis and Tyapay's share of the two thousand dollars credit with Robinson, Magids and Company was charged to them upon Garbin's representation; he told me he had a letter from the boys—I did not see the letter; I took his word; Lesamis told me himself the same thing; Jack said so himself, that he was leaving everything with Garbin and with the Robinson, Magids and Company; I saw Garbin at Kiana in the winter after the settlement of 1910. I do not remember that Garbin said to me at that time that he wanted all his money or that I told him that Tyapay and Lesamis had paid their share of the two thousand dollars. Garbin got his money the same day as the settlement. I did tell Garbin in Kiana that Tyapay and Lesamis had paid their share of the two thousand dollars; I don't remember that I said he should do likewise.

In regard to the eleven hundred and fifty-eight dollars from Frank Lesamis, I remember something about Jack Lesamis asking if we could not extend him credit to pay his labor—said they were short of money, and that I told him I couldn't extend him any further credit on that account; he said then he would get it from his brother, who had quite [160] a little money, and for me to take it and to put it on the company's books to help pay up the labor, and he turned the money over to me. The money was in a strong-box. I don't remember who took it out;

(Testimony of H. Greenberg.)

everybody was handling it, so far as I know. Lesamis got the key from Andy Garbin; he got the key and they took the gold-dust out from the strong-box. I don't know who it was done it exactly, but I know Lesamis got the key to take the dust out of the strong box, some way, and gave it to me to take down to the store.

I gave Lesamis credit for it on the books—on the books of the Robinson, Magids and Company. I couldn't say whether it was charged up to the account of the Klery Creek Mining Company or the credit of the Klery Creek Mining Company. Jack Lesamis gave it to Robinson, Magids and Company to pay the debts with; Lesamis turned it over to me and I turned it over to them; I know Jack Lesamis said it was his brother's, and he said he borrowed it from his brother.

Before Robinson, Magids and Company got this money Frank Lesamis asked me for his money; I would not give it to him. I knew it belonged to him, but his brother had got it as a loan. I don't know who it belonged to. I know he demanded it but how should I know it belonged to him. Frank Lesamis said, "I want my money."

The eleven hundred and fifty-eight dollars gold-dust were the proceeds of gold-dust extracted from the Star Claim; Jack Lesamis got it as a loan. When he turned it over to me that is what he said when he gave it to me, he said to take it to help pay the bills.

[161]

When Frank Lesamis made demand upon me for

(Testimony of H. Greenberg.)

his share of the money taken from the safe. I did not say to him I would kill him; he said, "I am going to kill you; you took my gold. I want you to give me my gold-dust." This conversation was in the Kiana store; Stuart Fleming was present.

I did say to George Stanley, "It looks as if you wanted a lawsuit." When I went to Klery Creek in 1911, I did not order Garbin off the ground nor Jack Lesamis, or say that the ground was mine.

The reason for taking this second deed was that there was no acknowledgment on the first one, that was the only reason. Another reason was I had heard that they were not getting along up there on the creek as they should. I had heard that they were going to ruin the company and I was down in Kiana; it was fifteen miles away and from the way things looked it was likely to cause trouble; we were getting orders right along and no proceeds were coming in, and I was under the impression that it was the safest thing to do; Jack Lesamis brought in the first order and while he was there he repeated to me some things from the creek, and I thought it would be the safest thing to do would be to get a new deed. He said things are not going along as they have a right to do, and Moran advised me if I wanted to have this deed recorded the only thing to do was to have it acknowledged in proper form, and I thought I would have a new deed.

I stated in my direct examination that the only properties and assets of the partnership were these mining claims and some tools and cabins. Now, at

(Testimony of H. Greenberg.)

the close of the business in 1911 I didn't know how many provisions the partnership had. Mr. Fleming took stock, but I don't remember just [162] how much it was; I think it was about two thousand dollars worth. They were left with Lesamis and Garbin to take charge of; the instructions was that they were to realize what they could from what they could sell and turn the money over to Robinson, Magids and Company, who would give them credit for it, and any balances they might have left, after paying up any debts they have, any money they will derive, it would be taken to their account and they will be given credit for it; they could use what they needed and sell what they could, and then they would give credit for any money over, if anything is left, and we will charge the same to the account of the company, for that is all I can tell you, that when I left I left it *all them* and they can have it all if they want to.

This instrument exhibited to me is an affidavit for attachment. [(?) injunction] I did state in that affidavit that at all times between the 19th of March, 1910, and the 10th day of August, 1911, that said partnership conducted their mining operations and that said Stanley and Sallo are claiming that they are entitled to the first twenty-four thousand dollars gross output from the said Klery Creek Mining Company's claims without any regard to the operating expenses; that it was the intention of the formation of the said Klery Creek Mining Company of a copartnership that the expenses of operating

(Testimony of H. Greenberg.)

should be deducted and thereafter the net profits paid to the defendants Lesamis, Tyapay and Garbin, until they received the total sum of twenty-four thousand dollars; and at all times between the 19th day of March, 1910, and the 10th day of August, 1911, the said copartnership conducted their mining operations with that understanding, and during the summer of 1910, after paying [163] expenses of operating, the said defendants received about the sum of five thousand dollars, leaving a balance due the said Lesamis, Tyapay and Garbin of about nineteen thousand dollars payable from the first net profits and after all the present indebtedness of the said Klery Creek Mining Company is paid.

I did testify while on the stand that there were certain moneys and such assets as tools, etc., set aside for the payment of the expenses of future mining. I also testified that there was certain moneys taken from the cleanup of 1910 operations which were set aside for the payment of expenses of future mining; and I also testified that I paid Tyapay, Lesamis and Garbin certain moneys.

Now, when I mentioned this five thousand dollars having been paid, being a reduction of the twenty-four thousand dollars, I mean that this sum of five thousand dollars constituted the same moneys that were to be applied to the future expenses—the moneys that I paid to them individually.

(Paper shown witness.)

This is a charge to the Klery Creek Mining Company, three days carrying gold-dust one hundred

(Testimony of H. Greenberg.)

dollars and forty dollars for gold scales, charged to the company. Yes, I know now; I recollect, I carried the gold-dust to Nome; I recollect I carried it myself; I didn't remember until you showed me that. I don't remember the amount of gold-dust I deposited; I don't remember that I charged one hundred dollars for carrying gold-dust to Nome. I came with dog team; I came as far as Candle and when I left Candle they suggested to me that if I was coming to Nome, that the strong-box with the gold-dust should be brought to Nome. One hundred dollars was to be charged to me and one hundred dollars to the Klery Mining Company. We [164] had lots of dogs to feed and I consider that was a very reasonable charge; I don't know exactly if I was coming to Nome anyway that fall. I expected to get out some time later.

I testified that some leases were given to various parties of properties owned by the Klery Creek Mining Company; also that I was entitled to royalties which might come out of such leases; and I further testified that I am not entitled to anything until the twenty-four thousand dollars is paid—I mean any of the profits of the clear profits of the ground. I didn't collect any royalties; I know nothing about it. I don't remember anything about whether Robinson, Magids and Company had instructions to collect royalties for me, for my quarter interest in these properties; I don't know if they did. We were three equal partners in the Robinson, Magids and Company; my partners received the same amount as

(Testimony of H. Greenberg.)

I did; I have not had an accounting with Robinson, Magids and Company during the last two years. I don't remember if I bought any gold-dust from the boys when I saw them in the winter of 1910. I might have and I might not; gold-dust is no luxuries to me. I don't think there has been any mining done by myself since the summer of 1911 up there on these claims nor by the Klery Creek Mining Company that I know of. Tyapay was either in the States or in Europe during the summer of 1911; Lesamis was here in Nome in July and first part of August, 1911, when I went up the creek. I don't know if he took any part in the mining on No. 1 on Klery Creek in the summer of 1911.

Redirect Examination.

The charge of a hundred dollars for the trip to Nome [165] was a reasonable charge; I think it was worth about five hundred dollars; we were entitled to that much any way; I hired a dog team, went across by Candle; I did not charge that up against the company; I paid two hundred dollars for the dog team.

I said the boys on Klery Creek were living on a fish diet; I ascertained that from what they told me, and what I saw myself; we were up there for two days and they didn't have any meal except when they had fish; I didn't ask them myself nor I didn't go and visit their cache to find out.

The Oregon association claim had not been staked when I entered into that agreement to furnish the Klery Creek Mining Company. Tyapay,

(Testimony of H. Greenberg.)

Lesamis and the other partners were locators of the Oregon claim. I was staked in as one of the locators; there was no individual interest by reason of my location other than as a member of the Klery Creek Mining Company; it was all done under the partnership agreement; that is what I referred to when I spoke of getting the leases.

Now, in regard to that mortgage: When Tyapay asked me to loan him three thousand dollars, the amount of the mortgage was three thousand dollars, though I only advanced one thousand dollars—I will explain that; Mr. Tyapay arrived here in Nome in 1910; his intention was to quit the country; he was going outside to get married; he asked me if I would let him have three thousand dollars and then I would have to deduct that sum from his property when it is taken from the claims; I told him I could not give him three thousand dollars, but I will give you a thousand dollars, and you will give me a mortgage for three thousand dollars, and I will give you two thousand [166] dollars later on; that we will have lots of money coming in later on and I can do that; he said, “All right, you can do that; you can give me a thousand dollars now, and provided I am short of money you can send me the two thousand dollars later on, and I will sign you a mortgage now for the three thousand dollars, and I was to send him more money just as soon as I can and so he signed it; that is why the amount was fixed at three thousand dollars. No, I never sent him any money afterwards; I never got any more from the Klery

(Testimony of H. Greenberg.)

Creek; I didn't have any more money to send him; I never got any more myself. When the mortgage fell due I foreclosed it; I don't remember if I was here at that time or not; I remember it was foreclosed for me. I did not claim he owes me only what I loaned him one thousand dollars; I am more than willing to accept what I loaned him, regardless of the amount of the mortgage; I am willing to deed his interest any time he pays back the money I loaned him.

At the time I made that affidavit for attachment dated October 30th, 1912, I was not able to ascertain the exact amount that was paid to them.

Speaking about the work that was done on these various properties mentioned in the complaint, the work done by the Klery Creek Mining Company besides No. 1 Above and the Star Association, was work on several claims—built some camps on Klery Creek and done some prospecting and assessment work, about eight hundred dollars in value; this work was done on Klery Creek; it was done on some creek claims and also on some benches—several claims in that vicinity—claims described in the complaint.

Recross-examination.

I don't know that any mining was done on any claim [167] except No. 1 Above on Klery; I wasn't there; I have not been on the ground since 1911; I have not collected royalties from these leases, maybe Robinson, Magids and Company did.

I verified the complaint in that three thousand dollar foreclosure suit, and the judgment was en-

(Testimony of H. Greenberg.)

tered for the full amount. I admit that that judgment against Tyapay is wrong in amount. I am willing to deed it back to him after he pays this debt in three, four or five years.

Redirect Examination.

They did not fulfill their agreement with me when they staked me in giving me a quarter interest with them; the agreement does not speak that they were supposed to stake in anybody else; that is not what *what* we agreed to; they didn't stake me in for a quarter interest.

[Testimony of Martin Moran, for Plaintiff.]

MARTIN MORAN, called as a witness for plaintiff, testified as follows:

I resided at Kiana in June, 1911; the writing in this instrument is mine; this is the letter referred to in the deposition of Andrew Garbin and which Mr. Garbin asked me to write; I wrote what Mr. Garbin authorized me to or asked me to write.

Letter offered in evidence marked Plaintiff's Exhibit "I," as follows:

[Plaintiff's Exhibit "I"—Letter, Dated June 14, 1911, ——— to John Lichtenberg.]

"Kiana, Alaska, June 14th, 1911.

Mr. John Lichtenberg,

Keewalik, Alaska.

Dear Sir: Send the following telegram at your earliest chance:

Greenberg, Lesamis and Tyapay, care Bessie Store, Nome. Send forty men to our camp on Klery. No men to be had here. Andy Garbin." [168]

**[Testimony of H. Greenberg, for Plaintiff
(Recalled).]**

H. GREENBERG, recalled for plaintiff:

Mr. Lichtenberg was in Keewalik, eight miles from there; there was no telephone at Keewalik; we had to go down to the agent at Keewalik for transmission.

(Telegram, Plaintiff's Exhibit "F," offered and received in evidence, same as Exhibit "F" for identification.)

I received this telegram at the Bessie store about July 7th; I went to the hotel and had a conversation with Lesamis about sending men; he was in town yet; Tyapay left the day before that; yes, Lesamis consented to send these men; he said, "Send them; he must know what he is talking about; send them by all means." I hired some men, bought them tickets, paid their fare on the boat and sent them up; I think thirty men; I don't remember. The company, Robinson-Magids, paid the fares; they left from Nome; I think Philip Murphy bought the tickets; he is the agent for Robinson, Magids and Company; he was at the Bessie store in Nome.

Q. How did Robinson, Magids and Company happen to buy the tickets?

A. Well, they furnished the money for Klery Creek Mining Company to buy the tickets.

Q. At whose request?

A. Andy Garbin's request.

Q. Did he say anything about it in that telegram to send men; did you act on that telegram or did

(Testimony of H. Greenberg.)

Robinson, Magids & Company act?

A. Mr. Lesamis acted on the telegram.

Q. Who hired the men, you or Lesamis? [169]

A. Both of us; when I got that telegram I went out to find Lesamis and he came down to the store with me and just talked about it there, both of us together, at the store, both of us there.

Q. What instructions did you give Murphy?

A. I don't remember.

Q. Do you know what instructions Lesamis gave him?

A. I don't remember; I don't know anything about it. I don't recollect what he gave to him.

Q. Where was the amount of the fares charged, at the Bessie store?

A. I don't remember where they was charged.

Q. Was it ever charged on the books of the Klery Creek Mining Company?

A. Maybe; I don't know.

Q. You don't know anything about it?

A. I don't.

Plaintiff offered in evidence a part of the depositions of Andy Garbin as follows:

[Deposition of Andy Garbin (Part of).]

I gave Greenberg the gold, Izzy Brovda, wrote a receipt, gave it to Greenberg and he handed it to me.

Receipt referred to reads as follows:

“Candle, Alaska, —, 19—.

Robinson, Magids & Co.

Four hundred and fifty oz received of Klery Min-

(Testimony of George Stanley.)

ing Company A. Garbin H. Greenberg, John Tyapay, Jack Lesamis, four hundred and fifty oz gold dust to be applied on account after assay.

ROBINSON, MAGIDS & CO.,

Per I. PROVDA."

Witness excused. [170]

[Testimony of George Stanley, for Plaintiff.]

GEORGE STANLEY, sworn and testified for plaintiff:

Direct Examination by Mr. GILMORE.

I am one of the defendants. Ten or twelve leases were let in the fall of 1911. I have personally collected some royalty under such leases. Sam Sallo may have collected some. I collected about \$1300.00 for myself and the boys I represent. From claims mentioned in the complaint. I will prepare a statement.

Cross-examination by Mr. LOMEN.

The \$1300.00 royalties collected by me was one-half of the royalties. That represented the interests of Sallo and myself. Mr. Levy collected the balance. He represented Tyapay and Greenberg.

Witness excused. [171]

[Testimony of Sam Magids, for Plaintiff.]

SAM MAGIDS, a witness for plaintiff, testified as follows:

My business is general merchandise. I am a member of the firm of Robinson, Magids and Company; I am acquainted with all of the defendants in this case; got acquainted with them about eight

(Testimony of Sam Magids.)

years ago; I was present on Klery Creek about the 19th day of March, 1910; Lesamis, Tyapay, Garbin, Greenberg and I were present. I was present when negotiations toward forming a partnership were had; I heard what was said on both sides; they were dickering there for a night and a day or two days; they were explaining that they were in need of money—had no money to go ahead and develop the ground—I mean Tyapay, Garbin and Lesamis, they asked Greenberg and me to extend them credit; this was refused; finally they made an offer to sell one-half of the ground and after talking it over finally came to an agreement; Mr. Greenberg was to furnish supplies up to July 10th; they offered Greenberg a quarter interest in the ground; he pays them two thousand dollars in supplies up to July 10th, then six thousand dollars and twenty-four thousand dollars out of the profits of the ground. Garbin, Lesamis and Tyapay were to have charge of the working and handle it to suit themselves; writings were made out and signed; I wrote the instruments; the instruments offered in evidence, a memorandum and deed; I wrote them; there was no lawyer in the vicinity; I signed as a witness; Henry Bernhardt also signed as a witness. We left the morning after these instruments were signed, Greenberg and I; they gave him an order for goods to cover the two thousand dollars; the goods were sent from Candle; no charge was made for these goods against the Klery Creek Mining Company or the defendants.

I was at Candle during the summer of 1910; I went

(Testimony of Sam Magids.)

to Kiana the last of September, 1910; I was not there when the [172] Klery Creek Mining Company concluded their operations that fall; I was present sometime in December when one settlement was had between Garbin and Mr. Greenberg; that was after Mr. Greenberg had got back from Nome; I participated in the adjustment or settlement of their mining operations; I made a statement for them showing the total gross amount of gold taken out and the total expenses of their mining operations; this statement I figured out for Mr. Garbin and Mr. Greenberg to show how much money Mr. Garbin had coming to him on his third profit of the mining from the Klery Creek Mining Company; Mr. Fox was also present; Mr. Garbin was satisfied with this adjustment; he accepted it as correct; we settled with him right there on that basis; Greenberg was satisfied with it; I got my figures from the Klery Creek Mining Company's books; I got the figures off the books; Mr. Fox kept the books.

The gross amount of gold taken out by the Klery Creek Mining Company during the summer of 1910, was sixteen thousand three hundred forty-one and forty-two hundredths dollars; the gross expenses was eight thousand fifty-nine and $75/100$ dollars; the net profits for all summer's mining was seven thousand three hundred ninety-one and sixty-two hundredths dollars. As to what was to become of this seven thousand dollars, well, the instructions from Mr. Greenberg, it was supposed to be turned over to the three men; it was to be divided up be-

(Testimony of Sam Magids.)

tween these three men; Garbin said it was to be divided between the three; he claimed one-third of the profit, Tyapay and Lesamis were to have their two-thirds; they did not claim one-third of the gross; the amount *that paid* over to Garbin at that time was close to two thousand dollars; Garbin demanded that his third should be paid to him; at that time there was an arrangement made between Greenberg and Mr. Garbin as to the future operations of the company's [173] properties; they made a contract with Robinson, Magids and Company to deliver two thousand dollars worth of merchandise to be used during the winter and the next coming year on the Klery Creek Mining Company's ground, for which they were to pay two thousand dollars cash in advance; Mr. Garbin told me about this agreement; his statement for the goods they wanted for this two thousand dollars was made out and given to me by Mr. Garbin in writing; I think we have that statement in Nome now; I think the bill amounted to more than two thousand dollars; I gave Mr. Garbin, Robinson-Magids Company's check for thirteen hundred eighty-five and no one hundredths dollars, and he agreed to give me six hundred sixty-seven dollars of that, paying his third *pro rata* of the two thousand dollars; and he also kept money to the amount of one hundred twenty-seven and nine hundredths dollars. The whole amount that Garbin received was twenty-one hundred seventy-four and twenty-one hundredths dollars out of the profits. The check for one thousand three hundred eighty-

(Testimony of Sam Magids.)

five dollars dated December 22d, marked Plaintiff's Exhibit "K" for identification has the endorsement of Robinson, Magids and Company; Garbin did not wish to collect that check until later when he came over to Candle or Kiana; I should say he didn't want to write a check, so he gave me the check for this amount and I cashed it at a later date; then he went up the creek and I took the check away with me and I could have the check cashed without the endorsement of Mr. Garbin.

(Witness shown another check.)

This is the check that Mr. Robinson gave to Mr. [174] Garbin on April 17th instead of the check I gave him at Kiana in order to correspond with the Robinson, Magids Company's books; this is Andy Garbin's endorsement on that check; I was not present at Candle myself, but I testify because my journal shows the entry, the entry of Robinson, Magids and Company shows exactly the checks.

The checks referred to were received in evidence, marked Plaintiff's Exhibit "J" and "K." [175]

[Plaintiff's Exhibit "J"—Check.]

Candle, Alaska, Dec. 20th, 1910. No. —.

MINERS AND MERCHANTS BANK
of Candle.

Pay to Andy Garbin or order \$1385.00—Thirteen
Hundred & Eighty five Dollars.

ROBINSON, MAGIDS & CO.

By SAM MAGIDS.

Paid Apr. 12, 1911.

ROBINSON-MAGIDS CO.

Per. R.

(Testimony of Sam Magids.)

(On back of check:)

Paid Apr. 12, 1911.

ROBINSON-MAGIDS CO.

Per. R.

[Endorsed]: #2345. Greenberg vs. Lesamis et al. Plffs. Exhibit "J," for Identification. Sept. 16, 1913. J. Sundback, Clerk. By J. A. B.

#2345. Greenberg vs. Lesamis et al. Plaintiff's Exhibit "J." Filed Sept. 16, 1913. J. Sundback, Clerk. By J. A. B., Deputy. [176]

[Plaintiff's Exhibit "K"—Check.]

Candle, Alaska, April 12, 1911. No. 592.

MINERS AND MERCHANTS BANK
of Candle.

Pay to Andy Garbin or order \$1385.00—Thirteen hundred Eighty five #——— Dollars.

ROBINSON, MAGIDS & CO.

By H. ROBINSON.

· For ck. of Dec. 20/10.

By SAM MAGIDS.

(Miners & Merchants Bank. Apr. 13, 1911. Paid.)

(Endorsed on back of check:)

ANDY GARBIN.

[Endorsed]: #2349. Greenberg vs. Lesamis et al. Plaintiff's Exhibit "K." Filed Sept. 16, 1913. J. Sundback. By J. A. B., Deputy. [177]

The amount of money in cash that Mr. Garbin kept at the time of this settlement was one hundred twenty-seven and nineteen hundredths dollars; the amount of his share paid for groceries was six hun-

dred sixty-seven dollars, and the amount of the check is thirteen hundred eighty-five dollars:

Statement received in evidence marked Plaintiff's Exhibit "L," as follows: [178]

[Plaintiff's Exhibit "L"—Statement.]

		8959.75	
294 50	Tyapay	248 50	
1225 75	Lesamis	207 25	
404 50	Garbin	208	9000
1926 93		205 25	1000
685 00	R M Co.	208 25	2000
			<hr/>
176 00		208 25	12000
454 50	Quillan 139	208 75	1400
			<hr/>
883 70	Fox-9/20 @		
12/24		209 75	13400
111 62	Millen	210 25	1500
not exp- 38 00	Stanley &		
	Johnson	206 25	
390 25		198 75	2000
			625
339 50		138 25	
15		5 50	
189 75		80	800
		<hr/>	
			395
30 00		2543 00	
480		39 5	
83 80			

252 50

7981 30

 7981 30

2543 00

 10524 30

598 [179]

Joe Quillan	454 50
W. W. Fox.....	58 50
K. M. Co. by John Tyapay.....	685 50
John Millen	111 62
Mke Joyce	135 25
James Flood	335 00
W. W. Fox.....	15 00
James Flood	40 00
John Agusarof	232 75
Mke Gussof	208 75
Mike Agussarof	207 25
Geo. Gussoff	193 75
Tim Buzzof	205 25
Sam Buzzof	206 25
Mike Arsoff	103
Geo. Cozoff	198 75
Pete Minzie	239 75
Pet Arsoff	207 50
Andy Solomon	192 50

 4030 87

4030 87

Sam Asof	191 00
Chas. Matusa	225 00
R. H. Fox	580 00

John Tyapay	292 50
Jack Lesamis	1225 75
Ike Hobson	1 80
R. M. Co.	1841 83

8388 75

Andy Garbin	395 00
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8783 75

Iron Box	36 00
Carrying Gold-dust by H. G.....	100 00
1 Gold Scale	40 00

8959 75

[180]

23 $\frac{3}{4}$ Money to Moran 65425

40 $\frac{1}{2}$ 3

40 oz to Moran 726 80

38 $\frac{1}{4}$

7 oz Nugget to Garbin 127 19

52 2

Assay by H. Greenberg

12 $\frac{1}{4}$

15497 43

179

16351 42

120 $\frac{1}{2}$

79 $\frac{3}{4}$

42

15497 43

128 $\frac{1}{4}$

8959 75

46 $\frac{1}{4}$

3) 6537 68

57

(Testimony of Sam Magids.)

27	$\frac{1}{2}$			2179	22
21	$\frac{1}{4}$			127	19
<hr/>					
25	$\frac{1}{2}$	1		2052	03
<hr/>					
			3)20.00		
7			18	667	667
<hr/>					
			20		
<hr/>					
900	$\frac{3}{4}$	6	20	1385	03
<hr/>					
47				2052	
<hr/>					
853	$\frac{3}{4}$	6		08	
36				2001	
<hr/>					
817					
1817					
40	7				
<hr/>					
72680	12719				

[Endorsed]: #2349. H. Greenberg vs. J. Lesamis et. al. Plaintiff's Exh. "L." Filed Sept. 16, 1913. J. Sundback, Clerk. By J. A. B., Deputy. [181]

I returned to Kiana about February; during this time there was work done by the Klery Creek Mining Company; Garbin had charge of one camp on Center Creek; they were prospecting and doing assessment work; Bob Fox had charge of the Beer Creek camp, Stuart Fleming came over from Nome and took charge of the work; I went to see them a few times;

(Testimony of Sam Magids.)

I do not know the claims they were on; they worked in several places doing assessment work and prospecting. In November I went to Candle and from there to the outside; I had charge of the store at Kiana while there; Mr. Levy kept the books.

The rest of the profits for 1910, not paid to Garbin, was paid to—two thousand three hundred ninety-three and eighty hundredths dollars to Jack Lesamis and six hundred sixty-nine dollars, which was his share of the two thousand dollars outfit deducted from that; seven hundred twenty-six dollars and some cents that he loaned to Moran was also charged to him on the company's books; of the balance John Tyapay received two thousand dollars cash at the Candle Store, six hundred sixty-seven and thirty hundredths dollars out of the two thousand dollars which Tyapay should pay as his part in the fall of 1910, that consumed the entire profits—no, there was a balance of about one hundred fifty-one and sixty-two hundredths dollars which they still had coming from the Robinson, Magids Company to make up the seven thousand three hundred and sixty dollars; this balance has been used up in the works during their mining operations. Greenberg received no part of said profits.

I met Mr. Lesamis at Kotzebue on my way to Kiana that fall in 1910; he told me he was not going to go back any more until he got rid of his partners; he was waiting at Kotzebue [182] for Greenberg to go outside; he told me that he had more than two thousand dollars, twenty-two hundred dollars, I think,

(Testimony of Sam Magids.)

coming to him from the profits of that year; that he was going outside; that he was going to get Greenberg to give him money to go out with. I told him, "I will give you a note to Mr. Robinson for himself and Tyapay, because I knew they had about three or four thousand dollars coming out of the profits of that year; for him to give it to Mr. Greenberg when he got to Nome and he will advance you the money to go out." I sent down the note written to H. Robinson at Candle, I know that this three thousand dollars, one thousand to Lesamis and two thousand to Tyapay, was afterwards paid according to that note.

I got back to Kiana in the fall of 1911 after operations had ceased; I met Garbin, Lesamis, Stanley and Sallo there then; we had a conversation looking toward an adjustment of the Klery Creek Mining Company's affairs; we had several talks; this was before this suit was started; I understood that Garbin and the others had transferred their property and I asked them about it, they told me I was wrong; they told me the property was transferred in trust for them until matters could be settled up; they offered to settle with me on a certain basis: Stanley on behalf of Garbin's interest offered me fifteen per cent and twenty per cent royalty that was given on the leases; he offered me representing Robinson, Magids and Company, and to give me security on the ground; they did not then dispute the Klery Creek Mining Company's indebtedness; they did not contend that the Klery Creek Mining Company had derived any profits that summer. [183]

(Testimony of Sam Magids.)

Cross-examination.

At the time of the agreement between Greenberg and the defendants Lesamis, Tyapay and Garbin, we went over to see what there was in the strike on Squirrel River and to collect some accounts, and we had in contemplation the starting of a store in Kiana if the strike would show up good. We found Lesamis, Tyapay and Garbin on Klery Creek; I went to their cache occasionally for dog feed; they had a good supply of provisions in some articles; they had flour; they did not have a good supply of provisions; they lacked everything with the exceptions of flour; I am positive about that; it didn't take a man long to see what kind of an outfit they had that has been handling groceries for years; they might have had groceries that I didn't see; I didn't see anything; I saw there was fish and plenty of flour.

I believe Mr. Greenberg got about fifty dollars worth of gold-dust from them; there was no agreement drawn up whereby they was to sell Greenberg a half interest; Bernhardt got there the afternoon when we were ready to sign up the agreement; I don't remember which agreement was signed first; I don't remember that we had any conversation as to the terms of the partnership after the agreements were drawn; the conversations and understandings were concluded before the instruments were drawn; they came to a full understanding.

Q. Why didn't you embody in the partnership agreement the terms of the partnership?

A. I asked a good many times if that was the agree-

(Testimony of Sam Magids.)

ment before, *before* to make it more plain, and Mr. Garbin and Mr. Lesamis spoke up and said, "We understand that we are to [184] get twenty-four thousand dollars after the expenses are deducted; we don't expect you to pay before the expenses are deducted"; those are just the words *they* were used.

Q. Was the twenty-four thousand dollars mentioned in the partnership agreement?

A. It was mentioned in the deed.

Q. What has the deed to do with the partnership agreement?

A. I am not lawyer enough to know that, Mr. Lomen.

Q. Now, if the agreement, if everything is stated in the agreement, what was the purpose of drawing up a deed?

A. I suppose it was for the purpose of showing that Mr. Greenberg was to give them supplies up to July tenth.

Q. What else was the agreement to show?

A. It simply shows the partnership.

Q. How long was the partnership to last?

A. As long as they could get along, I suppose.

Q. Just as long as they wanted it? A. Yes, sir.

Q. How much should each individual put into the partnership?

A. There was no special amount stated, but I understood that he was to pay them six thousand dollars in cash and they were to have twenty-four thousand dollars out of the profits that would come out of the ground.

(Testimony of Sam Magids.)

Q. What were they to get the twenty-four thousand dollars for?

A. For the ground, it originally belonged to them, I [185] suppose.

Q. What did they give for this thirty thousand dollars?

A. They were to give Mr. Greenberg a quarter interest; they gave him a deed supposing they were to get twenty-four thousand dollars out of the ground.

Q. Now, was there anything else that Greenberg was to get for the thirty thousand dollars?

A. He was to get the profits off the one-quarter interest.

Q. Now, what were the boys going to do on their part to offset the groceries furnished by Greenberg?

A. They were to go ahead prospecting the ground until July.

I was not present in the fall of 1910 when the boys came to a settlement at the conclusion of the mining in 1910; I did not hear Greenberg's testimony in regard to the settlement at the close of the season in 1910; I understand there was no settlement made; they simply brought the gold-dust down. Garbin told me, also Lesamis, that there was no settlement; they told me they had left the gold-dust when they got back to Nome; then Garbin and I got together and settled up just to see how much they had coming; they knew they had approximately two thousand dollars apiece coming.

At the time I held back six hundred and sixty-seven dollars of Garbin's money, I did not strike a

(Testimony of Sam Magids.)

balance from the Klery Creek Mining Company's books; I did not tell him that Tyapay and Lesamis had paid their share toward the two thousand dollars of groceries; this six hundred and sixty-seven dollars became a charge against Tyapay and Lesamis about the same time [186] the goods were being delivered to them; when I made an entry. I had authority under their own agreement; Mr. Greenberg himself told me; I was present when Garbin told him; I was not present when Lesamis and Tyapay agreed that so much was to be held out; I only know what was told me by Greenberg and Garbin; Greenberg says, "Sam you will hold off all told two thousand dollars to be used for heavy staples for the Klery Creek Mining Company, for future delivery for the mining operations next summer and for their outfit this winter."

Lesamis received \$2,393.50 from the profits of 1910, of which he received a thousand dollars in Nome; he also received seven hundred twenty-six dollars and some cents, which he loaned to Martin Moran; I mean it was charged up against him; he took the money and turned it over to the third party; he took the money belonging to the Klery Creek Mining Company, which was made a charge against him on our books; he took it during the summer of 1910; Mr. Moran admitted that he got the money; Moran told me Jack Lesamis gave it to him; Garbin told me it was a private loan between Jack Lesamis and Martin Moran; I don't remember having seen a charge against Moran on the Klery Creek Mining Com-

(Testimony of Sam Magids.)

pany's books; in the settlement we figured it as against Jack Lesamis; I didn't examine what assets they had in their books; Andy Garbin told me to make that entry against Jack Lesamis; he said that he would not stand for that loan because Lesamis gave Moran that money without consulting the other parties; Garbin said he would not stand for any part of it; Tyapay would not stand for any part of it, naturally it was charged to the man who loaned the money; I know about Tyapay not standing for any part of it, because I asked Tyapay when he was on his way to Nome; he was in Keewalik; [187] he told me that Jack Lesamis took and loaned the money to Martin Moran; I charged the six hundred sixty-seven dollars to Lesamis because he agreed to pay it; he told me that at the time we met at Kotzebue before he took the boat for Nome. He told me Robinson, Magids and Company was supposed to hold back one-third of the three partners' share, Tyapay, Garbin and Lesamis; \$2,000.00 for the three for next year's operations.

Garbin gave the order for two thousand dollars worth of groceries, after he came back from Blossom about the last of November or the first of December; I think we sent them up to No. 1 and they were stored there in the company's house. Some of the orders were signed by Garbin, some by R. H. Fox and some signed by Stuart Fleming; the order for the two thousand dollars was given at one time for the heavy staples, like flour, sugar and so forth.

Q. When was any sum charged up against Mr.

(Testimony of Sam Magids.)

Greenberg for his share of the two thousand dollars?

A. You see that two thousand dollars was being put up by, as I understand them, for the next year's operations; after they settled up their workings that season, and whatever profit was left Mr. Garbin, Lesamis and Tyapay was to get that six hundred sixty-seven dollars apiece that they put up back, see. They were to contribute towards the work but it was to be held back and they were to get it back if they worked at a profit, being simply the sum that Greenberg had loaned the Klery Creek Mining Company in the start, over two thousand dollars to carry on their works.

Q. What did Greenberg advance?

A. Well, he advanced, or Robinson, Magids and Company advanced a line of credit. [188]

Q. Well, they didn't need any credit if they paid cash? A. They certainly did.

I don't know when they came to an agreement about the partnership name; I couldn't say for certain that it was at the time the agreement was drawn.

I think R. H. Fox was mining on the Oregon claim after the leases were made; I think he turned over certain royalties to Robinson, Magids and Company, who credited the Klery Creek Mining Company with them.

My instructions from Mr. Greenberg was to turn over this seventy-three hundred dollars or whatever it was to Mr. Garbin, Mr. Lesamis, and Mr. Tyapay, and to apply it to the twenty-four thousand dollars, which they had coming out of the profits of the

(Testimony of Sam Magids.)

ground, and I done so according to our books, so really Mr. Greenberg didn't pay thirty thousand dollars for a one-fourth interest as I understood it; I understood so then and I understand it *it* now the same way; he was to pay them six thousand dollars cash out of his own pocket and twenty-four thousand dollars balance they was to get provided the ground paid it; he was to pay it providing there was twenty-four thousand dollars profits came out of the ground, I received some royalties under those leases, this being under separate owners; I received altogether twelve or thirteen hundred dollars in royalties; of that I have given the Klery Creek Mining Company credit for two hundred dollars; that is all that belonged to them; I don't know to whom the gold-dust deposited with the Miners & Merchants' Bank in 1910 was credited; the gold was taken down here to Nome and it was transferred to Robinson, Magids and Company's account; I think [189] that was the way it was done; they got credit for it at Robinson, Magids and Company's, and they have drawn against it anyway; I could not tell you exactly how that was done.

Jack Lesamis took charge of all provisions and tools for the mining season of 1911 and he was supposed to have sold that stuff and whatever money was realized, to turn it over to Robinson, Magids and Company, who were to credit it back to the Klery Creek Mining Company; Greenberg told me they should be credited with that; I don't think anything was turned in.

(Testimony of Sam Magids.)

Redirect Examination.

Q. Mr. Magids at the time you drew this memorandum agreement and that deed on the 19th day of March, 1910, why did you not put in one of those instruments the fact that this twenty-four thousand dollars should be paid out of the net profits of the ground?

A. Well, I was going to put that in and he said, "Don't put that in, *he was* that simply will be confusing; we understand that thing very well amongst ourselves; there is no other people interested in it, and we know that we expect that twenty-four thousand dollars is to be paid out of the net after the expenses is paid."

Mr. Garbin and Mr. Lesamis and Tyapay told me the same words.

**[Testimony of H. Greenberg, for Plaintiff
(Recalled).]**

GREENBERG, recalled for plaintiff, testified:

Robinson, Magids and Company have no interest in the Klery Creek Mining Company and never had. I am liable to my partners personally for the indebtedness of the Klery Creek [190] Mining Company; it was all charged up to me personally.

Stanley, Lesamis, Garbin, Sallo and Tyapay represented to me that they were insolvent; they said they had no money; I had no conversation with Tyapay as to his assets; with the others I did; they said they had nothing outside of their mining properties.

(Testimony of H. Greenberg.)

Cross-examination.

Q. What became of the gold-dust?

A. Well, the gold-dust was held by the Klery Creek Mining Company altogether as an asset and then it was handed to me to be sent down to be assayed; I don't know who at the store collected the money, but it was sent down as an asset of the Klery Creek Mining Company to show how much they *they* had coming apiece, and Robinson, Magids and Company gave them credit for it to show, after the bills was paid, what balance they had coming to them. I don't know who gave it to me, but the men at the mine anyway, to bring to Robinson, Magids and Company; then later they deducted their balance which was coming to them and then gave the Klery Creek Mining Company credit for the balance; that is how they got the profits for the year 1910.

The gold-dust reached the bank and they gave credit in money to Robinson, Magids and Company's store; I don't remember if Robinson, Magids and Company had credit in the Bank for this gold-dust; we credited them with the balance that was coming to them; it is on the books. [191]

[Testimony of W. L. Levy, for Plaintiff.]

W. L. LEVY, a witness for plaintiff, sworn and testified:

Direct Examination.

I am clerking for Robinson-Magids & Co. at Kiana. I have no interest in the company. I have been there since the fall of 1910. Mr. Garbin lived there in the winter of 1910 and 1911. Mr. Fleming was there

(Testimony of W. L. Levy.)

that winter. He was superintendent for Klery Creek Mining Co. He did some prospecting on various claims and finally opened up on No. 1 Above. He was continuously employed. Garbin was the only one of the partners who was present during the winter. There were six employees. In the summer there were more. I kept the books for Robinson-Magids & Co. Stuart Fleming kept the books for Klery Creek Mining Co. The Klery Creek Mining Company purchased their provisions and supplies at our store. The time checks were paid at our store. I kept those items. The expenses during that winter until the season of 1911 opened was \$500.00 to one thousand dollars, advanced at the store for provisions, tools and labor. Garbin and Fleming carried on the work together till I left in August, 1911. I was not on the creeks. I did not see Garbin often. He would come to Kiana, talked to me about what he was doing, that he was making suggestions as to the manner the work should be done and he left Fleming do the work. With reference to Fleming he said: "I don't know what to do about Fleming. If Greenberg was here he would not stand for the way this man was doing. Greenberg sent him up. I am the only one of the partners and suppose I will be held responsible for what is done. If we fire him we can't get a man in his place. I think that would be the best thing to do." Another time he said: "What do you advise?" I said, "I have no power over him." Garbin said that Fleming antagonized him, paid no attention to him. In none of the conversations did

(Testimony of W. L. Levy.)

he represent that he had no interest in the mining in any way or manner personally. Garbin ordered goods for the [192] Klery Creek Mining Company at our store personally, very frequently. We shipped them to the camp where Fleming was. We delivered statement of sales to Garbin. He called attention to errors. When found to be errors they were corrected. The statements were made to the Klery Creek Mining Company. He did not complain that they were so made out. He never contended that the bills were Greenberg's personally.

In the fall of 1911 I saw Garbin about signing a deed made out by Mr. Hobbs, the one that had been previously signed by his partners, Lesamis and Tya-pay. Greenberg asked me if I could induce him to sign it; he said he would not, said others were interested; said it was a close question and would not sign until he knew more about it; said he had placed his matters in the hands of George Stanley and that George had told him not to sign any papers without first telling him.

In the fall of 1911 I made an itemized statement of the indebtedness of the Klery Creek Mining Company to Robinson-Magids & Co. This is the statement, made from the books of Robinson-Magids & Co. It is a correct statement; bears date September 1st, 1911. It corresponds with the items in the books of the Klery Creek Mining Co., except items of interest. Statement marked Exhibit "M" for identification.

[193]

[Plaintiff's Exhibit "M"—Statement.]

Deering, Alaska, Sep. 1, 1911.

M Klery Creek Mining Co.

Andy Garbin

John Lesamis

John Tyopay

(Geo. Stanley)

(Sam Sallo)

ROBINSON, MAGIDS & CO.

Bought of

Jobbers and Dealers in General Merchandise, Hay,
Grain and Lumber.

1910

Oct.	23.	Inv. #	179	.....	13	50
	20.	" "	194	.....	5	50
	29.	" "	200	.....	4	50
Nov.	2.	V. R. #	117	.....	5	00
	3.	Inv. #	205	1925		
			# 252	6 00..	25	25
	13.	V. R. #	124	.....	70	00
	15.	" " "	127	....	90	00
	25.	Inv. #	290	.....	5	50
	27.	" "	298	.....	14	50

233 75

Dec.	12.	V. R. #	133	.....	95	00
	17.	Inv. #	356	.....	35	55
	16.	" "	360	.....	33	80
	19.	" "	361	.....	15	37
	18.	" "	364	.....	86	42
	18.	" "	365	.....	24	70
	"	" "	366	.....	56	25
	"	" "	367	.....	24	70
	"	" "	370	.....	80	00
	23.	" "	371	.....	34	80
	21.	" "	375	.....	33	75
	"	" "	381	.....	7	00

20.	"	"	382	60	35
26.	"	"	383	19	00
27.	"	"	386	123	00

[194]

20.	V. R.	#	142	168	00
24.	"	"	151	26	25
27.	Inv.	#	393	22	90
26.	"	"	394	58	45
25.	"	"	398	75	37
30.	"	"	413	100	70
31.	V. R.	#	157	16	00
"	Inv.	#	415	250	00
"	"	"	416	1	30

 1448 06

1911

1681 81

 Forward P. 11681 81

Jan.	6.	Inv.	#	422	3	94
	3.	"	"	429	27	65
	12.	"	"	438	477	25
	21.	"	"	461	1	50
	30.	V. R.	#	5019	100	00

 610 34

Feby.	—	Inv.	#	493	63	10
	13.	"	"	502	79	17
	13.	"	"	503	200	00
	8.	"	"	511	22	00
	—	V. R.	#	5022	1	25
	3.	"	"	5027	185	00
	10.	Inv.	#	544	14	00
	27.	"	"	549	57	75
	27.	"	"	570	502	81

 1125 08

[195]

Mar.	1.	V. R. #	5066	4 00	
	2.	Inv. #	578	129 40	
	15.	" "	612 & 613 . . .	200 85	
	19.	" "	621	31 00	
	17.	" "	625	32 80	
	18.	" "	641	1 00	
	18.	" "	642	19 15	
	30.	" "	658	14 35	
	30.	" "	665	6 00	
	30.	" "	667	2 70	
					441 25
Apr.	1.	" "	673	50 00	
	1.	" "	675-676-677.	231 60	
	—	" "	680	18 00	
	19.	" "	726	95 45	
	21.	" "	731	17 00	
R-M Co.					506 40
	24	" "	756	94 35	4364 88
	—				
	27.	" "	757	148 29	
R-M & Co.					654 69
					4513 17
					4513 17
Apr.	28.	Inv. #	759	194 50	
	30.	" "	773	205 25	
					399 75

May	1.	“	“	776 B-1-2-3	2701	75
	1.	“	“	777	140	83
	—	“	“	782	52	38
	3.	“	“	786	630	90
	7.	“	“	815	19	50
	—	“	“	824	30	50
	31.	“	“	839	72	00

 3647 86

[196]

June	6.	“	“	845	99	75
	18.	“	“	882	93	25
	28.	“	“	898	9	00
	25.	“	“	904	110	55

 312 55

July	3.	“	“	920	25	00
	11.	“	“	932	8	50
	14.	“	“	933	63	00
	16.	“	“	940	8	50
	17.	“	“	941	24	75
	19.	“	“	943	114	50
	24	“	“	951	18	50
	—	V. R.	#	5178	12	50
	—	Inv.	#	952	27	00
	25.	“	“	955	18	00
	26.	“	“	960	140	00
	28.	“	“	961	194	25
	31.	“	“	962	50	75
	29.	“	“	996	993	00
	30.	“	“	999	322	82

 2021 07

Aug.	4.	“	“	1014	43 75	
	7	“	V. R. #	5208 ...	4 50	48 25

10942 65

Forward p. 3.....10942 65

Aug.	6.	V. R. #	5209	4 50	
—	“	“	“ 5210	6 50	
	8.	Inv. #	1026	194 25	
	11.	“	“ 1033	15 00	
	12.	V. R. #	5217	4 35	
	12.	“	“ “ 5218	3 75	

[197]

	16.	Inv. #	1044	43 55	
	24.	V. R. #	5232 & 5233	9 30	
	21.	Inv. #	1047	55 00	
	22.	“	“ 1053	34 25	
	24.	“	“ 1054	68 25	
	26.	“	“ 1059	8 50	
	28.	“	“ 1064	85	

448 05

Interest on Nov. acct. \$233.75

—9 mos. @ 1%..... 21 04

Interest on Dec. acct. \$1448.06

—8 mos. @ 1 %..... 115 84

Interest on Jan. acct. \$610.34

—7 mos. @ 1 %..... 42 72

Interest on Feb. acct. \$1125.08

—6 mos. @ 1% 67 50

Interest on Mar. acct. \$441.25

—5 mos. @ 1 %..... 22 06

Interest on Apr. acct. \$1265.03

—4 mos. @ 1 %	50 60	
Interest on May acct. \$3647.86		
—3 mos. @ 1 %	109 44	
Interest on June acct. \$312.55		
—2 mos. @ 1 %	6 25	
Interest on July acct. \$2021.07		
—1 mo. @ 1 %	20 21	
	<hr/>	455 66
Labor Acct. Klery Co. Mng. Co.		
Ledger, p. 178	13955 30	
Interest on Amts. pd. against above Dec. 1910 @ Aug. 1911	104 42	
Teaming Account Klery Cr.		
Mng. Co. Ledger, p. 130...	1678 70	
Freight Account Klery Cr. Mng. Co., Joe Quillan Bills	934 05	
Freight Account Klery Cr.		
Mng. Co., J. Mellen Bills...	208 58	
M. F. Moran Account—See Bill	.311 50	
Paymt of amount advanced Kl. Cr. M. Co., by A. Garbin Ledger, p. 40	88 00	
Paymt of Time etc. claimed by	<hr/>	18052 55
A. Garbin, see Bills	772 00	
	<hr/>	
Tot. Debits	29898 91	
[198]		
Forward, p. 4—Tot. Debits	29898 91	
Credits:		
By Amount pd. on Outfit del'd May, 1911	2001 00	

By Interest as chgd. above on		
May acc't.....	60	03
By Amt. allowed on Bills Sep.		
20/11	217	32
By Commissary, Fares, etc., de-		
ducted from Time Chks....	709	68
By Dust pd. on a/c 479 $\frac{1}{4}$ oz 2		
dwt. @ 18 00.....	8628	30
By Dust Paid. Paid on a/c by		
Lesamis 913.85 and Garbin		
244.73	1158	58
	12774	91
	<hr/>	
	\$17124 00	

[Endorsed]: Statement R. M. & Co. Klery Cr. Mng. Co. #2349. H. Greenberg vs. Jack Lesamis et al. Plaintiff's Exhibit "M" for Identification Sept. 17, 1913. J. Sundback, Clerk. By J. A. B. Deputy.

#2349. H. Greenberg vs. Jack Lesamis et al. Plaintiff's Exhibit "M." Filed Sept. 17, 1913. J. Sundback, Clerk. By J. A. B., Deputy. [199]

[Deposition of Sam Sallo (Portion of).]

A portion of the deposition of Sam Sallo was offered in evidence by plaintiff as follows:

Q. Now, then, what reason, if any, did Spanish Jack give you for selling out?

A. Well, he did not say anything to me; the only thing he told me he did not understand much about mining and the first thing he told me if I want *to foreman* for him, and then next thing he said if I

(Testimony of Andy Garbin.)

want to handle the property for him I could have it. I said, "I got no money." He said, "How much you want to give it to me." I said, "I got no money." "Well," he says, "I know you for a long time and I let you have it for five thousand dollars, and the first time you get money you give it to me."

Plaintiff rests.

[Testimony of Andy Garbin, for Defendants.]

ANDY GARBIN, called as a witness for defendants, testified as follows:

I was born in '67; I am eight years in Alaska; have lived in Kiana since 1909; Lesamis, Tyapay and I located claims, some separately and some together. We subsequently sold a quarter interest in all our holdings to Greenberg. We were living on Discovery claim when Greenberg came to us—Sam Magids was with him. He said he heard we made strike; we told him and showed him the gold about fifty dollars; we gave it to him. It was prospect gold—we were just prospecting. We told him what claims we had. He said they looked pretty good to him. He says, "You boys have no grub." I said, "We got lots grub," three or four tons. He said, "I want you partners, you fellows, I like you pretty well, I buy interest, so if you want to sell [200] half interest I want to buy it. How much you want for it?" I said, "We want two thousand dollars cash now and fifty thousand dollars for one-quarter interest to be partners with us." He said, "That is too much money—I make proposition, I give you fellows fifty

(Testimony of Andy Garbin.)

thousand dollars, money help take out the ground.” Next morning Greenberg says to me, “Better, Andy, you get in for be my partner.” I said, “Better, Mr. Greenberg, you buy everything one hundred and twenty dollars.” He said “No, I need somebody for mine ground; I want for my only interest with you Spanish boys—I got man draw papers.” Next morning he start in for draw paper. He got in paper buy half for fifty thousand dollars. Then there was discussion. He said, “You better come down.” I said, “Whole property worth one hundred and twenty dollars; let him pay thirty thousand dollars for we are partners for one-fourth interest.” So he says, no, he got no money to pay us then. He said he would pay six thousand dollars each and twenty-four thousand for his share of the property. So he draw up another new paper—he gave us two thousand dollars apiece, by checks—Sam Magids draw the agreement and then the deed. The instruments in evidence—no other agreement was drawn—as I understood it, the twenty-four thousand dollars was to come from his share. First moneys from the ground. He got not one cent before he pay us twenty-four thousand dollars from the ground from his share mining.

That new deed presented by Greenberg for me to sign was different—I refused to sign it.

Greenberg also agreed to supply us what we needed in camp free—we got some, some no.

We commenced to use the name Klery Creek Mining Company about the middle of summer, 1910,

(Testimony of Andy Garbin.)

July, maybe. When we [201] started to work then we got books. We commenced building cabins, tents, bringing tools on No. 1 Above Star Association in March or April. We hired Bob Fox foreman; he kept books.

When we were through mining in the season of 1910, we went to Kiana with the gold-dust, over nine hundred ounces. Moran got seven hundred and twenty dollars in gold-dust; Lesamis, Tyapay and I gave it to him. We loaned it to him—one-third to each of us. It was taken out of the company poke.

When we got to Kiana Greenberg was there. I said, "Greenberg got nothing to do with this gold." Greenberg, he says, "You better take it to Nome, give to bank, then you have divided it in the bank, everyone taking his share, in money—Jack, Tyapay and I. The gold-dust was sent to Nome. I was not going to Nome so Greenberg tell me he give me my money, my share. He say, "I pay bank, I going to Nome. I meet boys in Nome in three days—I did not go, waited for Greenberg pretty near boys lost last boat. I went to store Kiana. I say to Mr. Magids, "Greenberg left some money for me here?" He said, "Well he didn't send anything up for you here yet, you can have what you want on credit." I don't know where the gold-dust went to—Greenberg returned in December, I see him in Kiana—I say, "Where is my money? You leave my money down in Nome in Bank?" He says, "Oh, no. Didn't you get your share, your share money?" I say, "No." "Well," he says, "You could get it right here from me any

(Testimony of Andy Garbin.)

time you want money.”

After that I see my foreman, I say to him, “You better get that money; I want my money, my share”; he says, “All right.” One night he come up and he say, “Here is your money.” “How [202] much?” I said. He said, “Twenty-one hundred dollars; he give you check thirteen hundred twenty dollars and the rest he, Greenberg, keep back, six hundred thirty-seven dollars, something like that.” Greenberg said when Tyapay went away that fall he promised two thousand dollars be left for company. I said, “I know nothing about that.” He said, “Well, better leave your money with the company anyhow.”

Greenberg got all the gold-dust; I tried to get the money on my check at the store. Magids said, “You got to go to Candle.” He gave me new check on Candle and tore up the old one. I take dog team and go to Candle cash my check, pretty near spring.

The talk I had with Greenberg about May, 1911, was about assessment work. Nothing was said about mining No. 1 Above Star Association because the other two partners went outside. Greenberg said, “I don’t care what you do”; he said, “go up and do the best you can; keep expenses down and I will let you have up to a thousand dollars to start up with”—buying groceries for me and my brothers.

Tyapay and Lesamis said nothing to me about mining in 1911. Before Lesamis and Tyapay went outside the three of us and Bob Fox and Greenberg talked together—Tyapay and Lesamis said they no want to do anything in the partnership mines—only

(Testimony of Andy Garbin.)

they want for be sure assessment work be done. Tyapay said he was through partnership. He would send money for assessment work,—next thing I go to Greenberg and ask him what shall I do now, if I commence mining that spring. He said, “I got no money bother any more you fellows—I got plenty money; I going to mine for myself, no bother you fellows any more—I am mining for myself—no matter if I [203] lose my money I going to mine for to suit myself.”

There was eighteen ounces of gold-dust from the Star Association—went to pay for expenses 1911; it was in the strong box on No. 1 Above; Fleming had the Key first; he gave it to me; I gave it to Jack Lesamis; I went to Kiana; I said, “Give nobody my money.” Greenberg afterwards told me that Lesamis gave him that gold-dust. I went to Kiana because Greenberg want to throw me out my part of partnership. He said, “You got nothing to do here. It is all mine—ground, improvements, everything.” Then I went to see Judge Moran—I must see somebody. Greenberg told me he took this Lesamis money. He says, “I got to pay bills.”

I sold to George Stanley; I stayed on No. 1 Above Star Association that summer to watch my interest, my quarter interest. I only was there laying around. Stuart Fleming hired and discharged the men. He was not under my direction or control. I was just like a stranger to him. Fleming told me he has charge of the work there. Greenberg had sent for him up. He changed everything. I got nothing to

(Testimony of Andy Garbin.)

do. What he says is boss.

In regard to orders signed by me they were signed at request of Fleming. I told Levy I no could get along with Fleming—I never had nothing to do with Fleming. I never object to him—he do what he please.

Greenberg claims one eight interest in the Oregon bench because we staked him in, and also claims one quarter of our interests under the partnership agreement. That is not right because he was staked in equal like that all of us. [204]

We had some talk in the early summer about leaving two thousand dollars for next year's work, but never agreed to do that; I never gave order for Lesamis or Tyapay—Lesamis never told me to represent him.

I brought gold to Kiana at Fleming's request; I gave it to the Store to Izzy Provda four hundred and fifty ounces.

After we got through on No. 1 Above, season 1911, leases were drawn. There was no understanding that the royalties was to go to pay Klery Creek Mining Company debts—the company had no debts.

I did not say to Hugo Eckhart, "See my foreman." He said, "Andy, could you let me have some men?" I say, "Well, you will have to see Mr. Fleming—I have not got charge of that—you have got to ask the foreman."

In regard to that telegram to get some men from Nome, I was on the creek—Stuart Fleming says,

(Testimony of Andy Garbin.)

“Andy, I give you a letter; you go to Kiana see Levy and tell him send me men forty or fifty.” He gave me that letter. I went to the store handed it to Levy. Levy said, “You go to Moran tell him write letter for you.” I did so; he wrote that blue letter and I signed my name; I did not tell him to sign my name; I tell him about the workmen, that is all.

I never authorized that Exhibit “J”; I never *was* that telegram until now in court.

When we quit mining in 1910, we sold everything—about two thousand dollars worth. Greenberg took it all—tools, grub, everything.

When that receipt for four hundred and fifty ounces of gold was given me I did not read it. I got a receipt for [205] four hundred ounces because I kept fifty ounces out—supposed to be mine. I hand another receipt first, got it from Izzy Provda. I did not know that the names of Garbin, Greenberg, Tyapay and Lesamis were on that receipt.

Original receipt, Exhibit “4,” offered in evidence as follows: [206]

In 1910, we agreed that gold-dust be taken to Nome; we were going to settle up in Nome—divide the money in Nome.

Cross-examination.

When we made the deal with Greenberg he agreed to furnish provisions to last till July. He gave us six thousand dollars in checks.

Bob Fox had charge of the work during the summer of 1910; Lesamis, Tyapay and I were there also; Greenberg got interest in all while we was a partner-

(Testimony of Andy Garbin.)

ship; in all we had before—we were all to put up expenses for that year; we sent orders to the store in Kiana for what we wanted; Greenberg was there; we did not know anything about that Magids Company; we got three thousand or four thousand dollars worth; the rest of the expenses went for labor; we were all to pay for it; we were to take it from the gold-dust. The rest was profit; the three of us got that, we three—Greenberg was to get nothing. The total amount of gold-dust taken out in 1910 was sixteen thousand three hundred and fifty-one dollars; the expenses were eight thousand eight hundred and sixty dollars, leaving a balance of seven thousand seven hundred and thirty dollars. That is about right. I got thirteen hundred and some over. I bought a nugget from the company, something like two hundred and seventy-five dollars.

I did not tell Magids to keep out anything—one-third of two thousand dollars groceries for the coming winter. [207] When I went to get my pay twenty-one hundred dollars, he just keep it—just kept my money.

I did not have an understanding with Greenberg, Tyapay and Lesamis that this bill for two thousand dollars should be sent in to the store, because the boys went outside. I don't know that Tyapay wrote out such a bill and gave it to Magids that fall. I don't remember anything like that. I heard you read his letter to Greenberg. We never agreed to that—I don't know what provisions that letter referred to. In the winter of 1910 and 1911, I lived in Kiana—I

(Testimony of Andy Garbin.)

was in different places—I worked three or four days on No. 1; then I went to the Star and helped them and then I go prospecting myself. I was on Bear Creek three or four days with Stuart Fleming; he had three or four men working—I did not work with him on Klery Creek; I went there some times—I slept in the cabin there with him three or four nights.

I know where Fleming was working that winter. I did not know that the expenses were charged up at the store against the Klery Creek Mining Company. Mr. Levy gave me statement every month and I checked them over. They were all made out to Klery Creek Mining Company; they were so made all winter until mining was commenced on No. 1 above. The bills were not delivered to me during the summer of 1911—not to me; to Klery Creek Mining Company; I got mistakes corrected. In 1911, the expenses in mining what he say was twenty thousand dollars, and the gold taken out was eight thousand dollars; Fleming attended the cleanup—sometimes me, sometimes Fleming handled the gold. He put it in the strong box; sometimes he sometimes I carried the key—I nearly all summer.

I stayed in the cabin with the strong box—I turned that gold over to Greenberg—I turned it to him for make settlement. I take fifty ounces out of poke for myself. [208] I gave him four hundred ounces but I told him I got about fifty ounces. Fleming told me he thought the poke was short. There was eleven ounces that I had never accounted for. When Greenberg came in the fall the men were asking for

(Testimony of Andy Garbin.)

their money. I don't know how many. Greenberg asked us boys to check over the accounts with him to see how much we owed for labor and groceries that summer. I did not say that I didn't owe my share. He wanted me to give him a mortgage. I did not want that. He said to Lesamis and me that if we would secure him by mortgage he would pay the men out of his own pocket. But I went down to Kiana, Stanley paid me nothing for that deed I gave him in Kiana. I gave it to him to handle my property—no one advised me—I gave him the deed that is all.

I did not say in my deposition after this action was commenced that I had no interest whatever in the claims of the Klery Creek Mining Company. I no got any at that time—no interest. I said I sold it to George Stanley. He was acting for me in trust—holding the property for me. In December we signed a new paper to show that Stanley represented me.

Paper offered and read in evidence marked Exhibit "V." [209]

[Plaintiff's Exhibit "V"—Agreement, December 27, 1911, Between Stanley and Garbin.]

#1704

This agreement and declaration of trust, made this 27th day of December, 1911, between Geo. L. Stanley the party of the first part and Andy Garbin of Kiana, Alaska, the party of the second part,

Witnesseth; That whereas on the 2d day of September, 1911, the said party of the second part granted, bargained and sold to the said party of the

first part, in consideration of the sum of seven thousand five hundred dollars (\$7,500.00) those certain mining claims lying and being in the Noatak-Kobuk Recording District, District of Alaska, to wit; All his right, title and interest in and to any and all Mining Claims, owned or held by said party of the second part in said District, and thereafter on the 17th day of December, 1911, made, executed and delivered to said party of first part a bill of sale of all his right, title and interest in and to all accounts, claims and demands of said party of the second part against one H. Greenberg and against the Klery Creek Mining Company: Also in all royalties accruing under leases of said premises conveyed as above mentioned.

It is now in consideration of One dollar to him in hand paid to said party of the first by the said party of the second part, and in consideration of mutual covenants hereafter mentioned, understood and agreed by and between said parties, that the said party of the first part shall, and he does hereby agree to hold the premises and property sold and conveyed to him, in trust for the use and benefit of the said party of the second part, and under and with the advice of said party of second part, will manage and account for said properties, and account to said party of the second part for all rents, royalties, issues, profits and proceeds of said properties; that is to say, he will pay and deliver to said party of the second part, sixty per cent (60%) of all net rents, issues, profits, royalties and proceeds on demand after cleanups or as soon as realized, re-

taining for his services, in lieu of the consideration heretofore agreed to be paid for said premises and property, Twenty per cent (20%) of the net rents, issues, profits, royalties and proceeds, the additional twenty per cent remaining to be paid to the attorneys [210] of said parties under separate agreement this day made.

It is further understood and agreed between said parties, that no charge shall be made by either of said parties, as against the other, for labor or services or expenses incurred in connection with said properties or litigation involving the same, said division of said net profits being in lieu of such services and expenses.

This agreement shall bind the heirs, executors, administrators and assigns of the respective parties hereto.

GEO. L. STANLEY. [Seal]

ANDY GARBIN. [Seal]

Signed, sealed and delivered in the presence of

O. D. COCHRAN.

G. J. LOMAN.

District of Alaska,
Cape Nome Precinct,—ss.

This is to certify that on this the 27th day of December, 1911, before me a Notary Public in and for the District of Alaska, personally appeared the foregoing named Geo. L. Stanley and Andy Garbin, personally known to me to be the identical persons described in and who executed the foregoing instrument, and acknowledged to me that they executed the same freely and voluntarily for the uses

and purposes therein mentioned.

Witness my hand and seal the day and year in this certificate first above written.

[Seal]

G. J. LOMAN,

Notary Public in and for the District of Alaska.

Filed for record at 9:30 A. M. Nov. 22d, 1912.

J. W. Southward, Recorder.

The foregoing is a true and correct copy of agreement as filed for record in Vol. 13 at page 234 of the records of the Npatak-Kobuk Recording District.

[Commissioner's Seal]

J. W. SOUTHWARD,

Recorder. [211]

[Endorsed]: #2349. H. Greenberg vs. J. Lesamis et al. Plaintiff's Exhibit "V." Filed Sept. 17, 1913. J. Sundback, Clerk. By J. A. B. Deputy. [212]

[Testimony of M. F. Moran, for Defendants.]

M. F. MORAN, witness for defendants, sworn and testified:

I live at Shugnak. In April, 1910, I went down to Kiana. I know plaintiff and defendants. A strike was made near Kiana in the fall of 1909 by Garbin, Lesamis and Tyapay. I was the Recorder and United States Commissioner for that district. They filed about forty notices of location. After October that year I drew up articles of partnership between them. Greenberg bought in in March, 1910. I told them that I would draw this agreement so they would be equal owners in all their holdings. They signed it and recorded it.

(Testimony of M. F. Moran.)

When I saw the boys in April, 1910, they told me of their understanding of their agreement with Greenberg. I found later that Greenberg had a different understanding. I heard several conversations between Greenberg and Garbin in June, 1911. They were discussing their differences. Mr. Greenberg said at that time with reference to future mining he would show them how to mine now; that he had brought a man with him and he would open up the country. Garbin was complaining that he was going it too strong for that kind of a company. Greenberg said that it was his money, that he had plenty of it and he would spend it as he saw fit; it didn't belong to Andy or any one else. Andy said that if there were losses he didn't think that the company could pay and that he had no money.

I was present at a conversation when Jack Lesamis told Greenberg he had not told him right about that new deed. Jack says: "Didn't you tell me this paper was the same as the old one?" Greenberg says, "What are you talking about? Here is your name on it, I have got your name on it. This is your name, is it not?" That was all that was said. [213]

Cross-examination.

None of the parties told me who were mining there in 1911. I thought they were all mining together. I didn't take any interest in it and didn't inquire into it.

I just recollect Greenberg speaking about this mining he was going to do; explaining that he had

(Testimony of M. F. Moran.)

plenty of means and that it was his business how he spent his money. I naturally supposed that it referred to the claims involved here. I wouldn't swear that they were not talking about benches not concerned in this partnership.

Redirect Examination.

Greenberg owned only an interest in the Oregon claim outside of the properties we were talking about. [214]

I sent that letter to send forty men—I did it for Fleming.

[Testimony of Andy Garbin, for Defendants (Recalled).]

Redirect Examination of GARBIN.

In the spring of 1911 I worked on Center Creek—part of winter—doing assessment work. In the spring of 1911, I was on No. 1 Above watching around for my interest—I do nothing—was not on pay.

I told Izzy in the store about taking fifty ounces out of poke. I took it out in Kiana—Fleming did not know about it. At the close of mining in 1911, I did not owe anybody anything. I first discovered that Greenberg held me responsible for summer's work in 1911 when he closed down and asked me. That was the first he ever asked me for anything.

[Testimony of Jack Lesamis, for Defendants.]

JACK LESAMIS, called as a witness for defendants, testified as follows:

My name is Jack Lesamis. I am married. When I went to Klery Creek—Squirrel River—Garbin

(Testimony of Jack Lesamis.)

and Tyapay went with me; we were prospecting and made a strike. We located many claims around there—about forty claims around there in our names. Greenberg came in March, 1910—Garbin, Tyapay and I had entered into a partnership in regard to mining before we met Greenberg; Judge Moran drew the agreement. We were living on Discovery Claim. Greenberg came and we talked business. He first tried to buy a half interest. We asked him something like sixty thousand dollars for half interest. We asked cash, but he wanted bed-rock. We showed him our partnership agreement. We entered into another partnership agreement. There were two papers—deed first, after this [215] grub business up to July.

For selling the ground, quarter interest, we got thirty thousand dollars, six thousand dollars cash; twenty-four thousand dollars come out of the ground from his share—provisions up to July. Agreement in conjunction with deed was for get provisions free up to July. We afterwards mined on No. 1 Above Star Association. I think Greenberg started to call it Klery Creek Mining Company. We took out over sixteen thousand dollars, something like seven thousand five hundred dollars net. I got one thousand dollars of it; I got no part of the gold itself; I got a check for one thousand dollars from Greenberg. He gave me a letter in Kiana and after I got it in bank. The letter was no good in bank. I telephoned to Candle—I want what is coming to me. The letter was addressed to the Nome Bank. It was no good there. Then I telephoned to Candle—

(Testimony of Jack Lesamis.)

then I went to Murphy and got my money. Murphy gave me a check and I took it to the Nome Bank. About twenty-five hundred dollars was given to me from the first season's work, but I got one thousand. I never got a cent more—Greenberg took the gold-dust. I don't know where he took it—down here to Nome to settle up here in Nome. I went outside. When I come back I see him here in Nome, in the spring. I tried to get the balance of my money. I no can get it. I ask Greenberg for it. I said, "I want my money"; he said he pay every bit of it—"I pay you up in camp"; "There is money up there for you." I went for get it—there is no money for me there. I told Greenberg, "Where is my money—I no get my money coming to me." He says, "I got some hundred dollars because I don't know how it was going next year." [216]

Before going outside in the fall of 1910, I had no understanding with Greenberg or any other person in regard to mining the following season. I was talking to Greenberg—I said for my share in my claims to do nothing at all—I got no money for works, to pay expenses. He said he not call for any money from you boys; "I no want anything off you boys."

(Exhibit "G" handed witness.)

I know that signature, John Tyapay. That ain't my signature—I know nothing about a letter dated Nome, Alaska, October 20th, 1910, written by Tyapay to H. Greenberg.

I left it with Bob Fox to see assessment work done

(Testimony of Jack Lesamis.)

—I did not leave my business with anybody up there in Kiana.

John Tyapay never returned; I did no mining in the summer of 1911. I was living up there looking around—Stuart Fleming was mining on No. 1 Above Star Association during that summer. He was mining for Greenberg; Greenberg told me himself, he says, “I am mining there.” I gave no directions about mining there at all. We built a new cabin there, I was living there; I built a cabin for me; I took no part in the mining, I got there the fourth or fifth of August, 1911: They worked there about two days after that. When Andy left he gave the key to the strong box to Fleming and he gave it to me. There was four hundred ounces of gold-dust that came from the Star Claim—Greenberg came in the morning and he says, “You got a key to the strong box; give it to me.” I said, “When Andy Garbin leave he leave it with me to keep for him.” Greenberg says, “Better I give it to him—better I open the strong box, if I didn’t want to get into trouble.” I open strong box like Greenberg told me—I put it on the [217] table and Greenberg took the poke. He weighed the gold, soon as he weight it he snatched it up. He has got my brother’s money, all my gold, all Andy’s gold, and he take it away with him—something like ninety ounces. He gave me a receipt for it.

(Receipt marked Exhibit 2 for identification.)

This looks like the paper Fleming gave me at the time he took the gold-dust.

(Testimony of Jack Lesamis.)

(Receipt offered in evidence marked Defendant's Exhibit 3.)

My brother and I called on Greenberg. He say the gold belong to the boys. My brother say, "You had no right to take that gold." I say I did not give it to him—he take it. He said, "I give you no gold, you got receipt for all that gold." I do not read English—I got no part of that gold back. It was charged to me.

When Greenberg called on us in March, 1910, it was said Greenberg was to put up all of the provisions to July free; then we mined on No. 1 above that summer; after July each to put up his share for all expenses; after that he want to mine. He said he is going to mine on his own hook, after 1910.

I signed the leases that were drawn at the close of the season of 1911. In the spring of 1910 we had four or five tons of grub—I had about three thousand dollars in money—Garbin had some money, Tyapay also.

I remember leaving Judge Moran seven hundred and twenty dollars. He wanted some two or three times, so I gave him about two hundred dollars one time and I leave instructions [218] with Andy Garbin to give him some more, and Tyapay—the three of us give him forty ounces. The first I ever heard that it was charged to me was here in court. I never authorized anyone to charge it up to me—Garbin, Tyapay and I were all present when Moran got that gold-dust.

(Testimony of Jack Lesamis.)

Cross-examination.

We said to Greenberg because he was trying to get in with us—we had prospected some—since then *then* we have found that it is not all so rich. We can make good wages on Discovery. No. 1 above is just the same. That is the claim we worked in 1910 and 1911. That Stuart Fleming worked. It is not all worked out. No. 2 above will pay to work—It has been prospected.

We had a partnership agreement at the time we made the deal with Greenberg. In that partnership we put the claims in jointly and worked as a partnership. We then took Greenberg in as a one quarter partner. He was to put up groceries until July; give us six thousand dollars and the balance out of his share in the ground. At that time the claims were all in the partnership.

I worked there all summer in 1910; I left early—Did not see Greenberg in Nome, because I had gone outside before Greenberg came here. Greenberg did not keep his word—he said he come in eight days. Before I left I went to Murphy and drew one thousand dollars; Murphy telephoned to Candle because we can't get our money here—we left Bob Fox to do the assessment work. [219]

In 1911 I saw the telegram from Garbin—I told Greenberg to do what he pleased; I did not say to Greenberg we will send them the men so they can go ahead with the mining—I had nothing to do with it; Greenberg sent the men; I didn't. I got there in August—I carried the key to the strong box when

(Testimony of Jack Lesamis.)

Garbin gave it to me—I ate and slept on No. 1 at the camp messhouse. I did not pay for it—no one asked me to pay; I never paid. I stayed around there till September—I took some supplies from the messhouse to my cabin; they were charged to me.

I sold my property to Sam Sallo. He has never paid me anything; I got interest from 1910; I got no interest in lawsuit; I do not own any of those claims: Sallo is supposed to pay me when he got some money; I have his promissory note; he is a friend—I trust him.

Greenberg told me in September, 1911, the men wanted their money—that there was not enough to pay them; Greenberg was mining for himself. Greenberg say that if Garbin and I would secure him he would put up the money; I never tell him I would give him security.

The first time that I ever argued with Greenberg that the partnership agreement ended in the fall of 1910, was at the end of the season of 1911, when the men were around there demanding their pay.

I did assessment work in 1912; Greenberg requested it by letter—It was on the claims in suit.

Greenberg had nothing to do with the loan to Moran.

In 1911, in Nome, I asked Greenberg for money from 1910. He told me he had sent the money up there to Kiana. When Greenberg came to the Camp he says, “You boys got nothing to do here; you better keep away from here—everything here [220] is mine—I own everything.

(Testimony of Jack Lesamis.)

I had one thousand dollars coming—I did not know that I had been charged up with one-third of two thousand dollars worth of grub and provisions—I did not know of such arrangement.

I did not get any of the royalty collected under the leases—Sallo may have. He is now in San Francisco. I hold no power of attorney from him.

Redirect Examination.

I authorized no one to make a charge against me for groceries after the work was finished in 1910.

When I returned from the outside in 1911, Greenberg presented a new deed to me. He says, “I got new document here—just like that one you made on the creek. Now, would you come to the store and sign that new deed? I want to put it on record here in Nome,” so I signed it—I did not read it—we read it, but I did not understand them big words. I would not have signed it if I had known that it was different from the first one. I found it out afterwards. Mrs. Lesamis signed as a witness; she does not read or speak English.

At the time we formed our partnership nothing was said about any claims going into the partnership at all. We was mining on No. 1 Above.

Recross-examination.

Hobbes read the deed to me in his office before I signed it. He just read it—he did not explain it. He was explaining something—I don’t know what for. I was trusting Greenberg. [221]

**[Testimony of Sam Magids, for Defendants
(Recalled).]**

SAM MAGIDS, recalled on behalf of defendants, testified:

(Witness shown Defendants' Exhibit 5 for identification.)

This is my signature—I had authority to sign this letter for Mr. Greenberg and Mr. Tyapay.

(Letter offered in evidence marked Defendants' Exhibit No. 5, as follows:) [222]

**[Defendants' Exhibit No. 5 for Identification—
Letter, December 17, 1912, Greenberg and
Tyapay to Lesamis.]**

Kiana, Dec. 17, '12.

Mr. J. Lesamis

Sir:

We want to be assured that the assessment work has been done on the Butte Assn. and the California. If you have done the work we are ready to settle for our share of the expense when affidavits have been filed to that effect.

Kindly see that such affidavits are filed before the 22nd of this month.

If no such filing is done by that date will take it for granted that the work has not been done, and we will send up men to do the work for us.

H. GREENBERG,

J. TYAPAY.

By SAM MAGIDS,

Agt.

[Endorsed]: #2349. Greenberg vs. Lesamis et al. Defts. Exhibit No. 5 for Identification. Sept. 18, 1913. J. Sundback, Clerk. J. A. B. [223]

[Testimony of Andrew Garbin, for Defendants (Recalled).]

ANDREW GARBIN, recalled for defendants, testified:

I did the assessment work on my own interest in the claims in 1910. Stanley did the assessment work in 1911, and 1912. I did the work with the boiler. I own the boiler still. I bought it in Nome in 1910.

Cross-examination.

John Morris helped me do the assessment work; I paid him; I gave him an order on Robinson, Magids & Company's Store. I had money over there. The order was paid. I got my groceries while doing the work from Robinson, Magids and Company—I paid cash for some; this was in the winter of 1910 and 1911. When I lived in the Camp on No. 1 Above I agreed to pay board. I have not done so; I was not asked to pay.

Redirect Examination.

I was only in the camp three or four times—this was before sluicing in the spring. I was not there more than two weeks altogether.

[Testimony of George Stanley, for Defendants.]

GEORGE STANLEY, witness for defendants, testified as follows:

My home is at Kiana. I am acquainted with plaintiff and defendants. I bought Mr. Garbin's interest

(Testimony of George Stanley.)

and I went over to Robinson-Magids Store at Kiana and told Mr. Greenberg that I had a deed from Garbin. He said, "Well, I have got a new partner." I said, "Yes." We talked over matters and things to avoid a lawsuit, finally the whole thing fell through.

[224]

Several propositions were made. I told Mr. Greenberg that the boys had not received all their money for 1910. He said that was all settled. I did not receive one cent from Mr. Greenberg on account of those transactions.

Sallo and I collected royalties under the leases that were given by Greenberg, Tyapay, Lesamis and Garbin; I collected for Sallo and myself—on the other side the royalties were delivered to Mr. Levy, the Greenberg, Tyapay interest. I have received no part of the twenty-four thousand dollars consideration.

**[Testimony of Sam Magids for Defendants
(Recalled).]**

SAM MAGIDS, recalled for the defendants, testified:

Direct Examination.

In the fall of 1910, there was a settlement between Greenberg, Lesamis, Tyapay and Garbin by which we credited up certain portions of the bills after they quit operations, that is all the stuff they returned—the bills before July, 1910, were charged to Mr. Greenberg on our books at Candle; we recognized only Mr. Greenberg—Mr. Greenberg was letting the men at Klery have the goods. The other bills were

(Testimony of Sam Magids.)

charged against the Klery Creek Mining Company. The bills agree with the statement furnished by Mr. Levy.

[Testimony of George Stanley, for Defendants.]

GEORGE STANLEY, for defendants, recalled and testified:

I was present at the time the leases were made out and when some of them were signed. Nothing was said about how the royalties collected were to be applied; I never heard any one who had any interest in this ground claim that the royalties were to be applied to Robinson, Magids & [225] Company's accounts.

I have done assessment work on the properties since acquiring an interest for the years 1911 and 1912, and some for this year. All the work specified in the supplemental answer and cross-complaint was done by me or under my supervision—one-half of said work, twelve hundred dollars, was for representing Greenberg's interest. No work has been done in the way of mining upon any of these properties since 1911, except by laymen.

Cross-examination.

The leases were for two years and expired this fall. The royalties collected by Mr. Sallo were not paid to Robinson, Magids and Company; they were for his interest in the leases. I paid Garbin his share of the royalties collected under the leases.

I did assessment work before the lawsuit was commenced in 1911, from September until about Thanks-

(Testimony of George Stanley.)

giving time, nearly three months. I did work on three or four different claims on Center. There were three of us working on four claims.

Garbin, Tyapay and Lesamis did not pay me anything for my work in 1911. In 1912 I worked on something like twelve or thirteen claims; they were not under leases. Personally I worked on about six; on others I had it done. I worked on Nos. 1 and 2 Bear Creek,—Garbin, Tyapay and Lesamis have paid me nothing for that work. In 1913 I personally worked on one claim on No. 2 Above Star, Tyapay, Garbin and Lesamis paid me nothing for same; I have never made demand on them. [226]

I was not present all the time while the leases were made out. I don't know the preliminary arrangements that were made.

Redirect Examination.

Sallo also did assessment work, his own work—the assessment work was all done this way. There was so many mining claims that had to be represented—there was no use of everybody putting in a one-fourth on each claim, so we divided up amongst us so as to be on every claim, so as to represent each claim, a hundred dollars worth was assessment work, so we would take certain claims and do all the work on those claims, and other claims; they did all the representing, so that every interest has been protected; we done all the work on all the claims and Mr. Greenberg has done none of the work. The work was not done by me as a member of the Klery Creek Mining

(Testimony of Sam Magids.)

Company; it was not done on their part—I did the work as co-owner.

[Testimony of Sam Magids, for Plaintiff (in Rebuttal).]

SAM MAGIDS, called as a witness for plaintiff, in rebuttal, testified:

I heard Moran's testimony in regard to certain conversations in June, 1910, with reference to what Greenberg was going to do as an individual. I was present at the time of this conversation; it had reference to some claims that Sam Marshal and Charles Call wanted to turn over to Robinson, Magids and Company. They were benches off Klery—Oregon Benches Nos. 5, 6, 7, and 8. That conversation did not have any connection with the Klery Creek Mining Company. [227]

[Testimony of H. Greenberg, for Plaintiff (Recalled in Rebuttal).]

H. GREENBERG, recalled in rebuttal, testified:

I heard Magids' statement in regard to that conversation; it was correctly detailed by him. That conversation had no reference to prospecting on claims belonging to the Klery Creek Mining Company.

[Testimony of W. L. Levy, for Plaintiff (Recalled in Rebuttal).]

W. L. LEVY, recalled in rebuttal, testified:

I was present in court when Garbin testified in regard to some conversation that occurred between him and me in the store about sending for men; he said

(Testimony of W. L. Levy.)

that there were not men enough to go ahead with the work profitably, with the mining operations; he said it would be a good idea to send for some men, I said, "I think there are men enough there to do the work." He said, "They ought to have more men; they really needed more men; it would make them able to get their work done for less wages. He argued with me to send the telegram. I refused to do so.

Cross-examination.

I did not direct Garbin to go to Moran. Garbin did not say to me that Stuart Fleming had sent him to make arrangements to get more men; I don't think he mentioned Stuart Fleming at all at that time.

[Testimony of Philip Murphy, for Plaintiff (in Rebuttal).]

PHILIP MURPHY, called as a witness for plaintiff, on rebuttal, testified:

I am the manager for Greenberg in the mercantile business, the Bessie Store. I was in charge of that store in July, 1911. I recall Greenberg receiving a telegram about [228] July 17th, with reference to sending men to Klery Creek. I got the telegram. I talked with Greenberg and Mr. Lesamis about the telegram. Greenberg told me to show the telegram to Jack Lesamis; he was then in town. I did so; they were both in the store. I read the telegram and explained to them that it was a telegram calling for forty men on Klery Creek. Greenberg asked Lesamis if he thought it advisable to send forty men, if were needed there by the company. Jack said he

(Testimony of Philip Murphy.)

thought the boys on the ground knew best; that if they thought they needed them he thought it all right to send them. He brought in a few that he wished to have sent up. He brought in his brothers and he brought in Sam Sallo. I sent the men up in response to the telegram received from Garbin.

In September, 1910, Tyapay and Lesamis were in town; they said they wanted some money of the proceeds of the Klery Creek. I talked to the men in regard to the amount each received; I gave them two checks and took two receipts; I went to the Bank with them at the time they drew their money; Lesamis, I believe, got one thousand dollars, and Tyapay two thousand dollars; they were together when I paid them; they were together when they drew the money at the bank. They talked about what they were going to do that winter. Jack, I believe, was to prospect and Tyapay was going out. Greenberg they said would go out also for the winter; they designated him as their partner.

I met Garbin in Nome in the fall of 1910; he spent about a week with me; he was then making preparations to do winter prospecting; they were going to prospect some of the property so as to know what to do the next year, the summer [229] of 1911; that was about October 1st, 1910.

I have no personal interest in this lawsuit; I am not employed by Robinson, Magids and Company.

Cross-examination.

Jack Lesamis brought some men to me to be sent

(Testimony of Philip Murphy.)

up to Klery Creek; he did not say he had hired them; he asked me to send them up.

I did not tell Jack Lesamis how much was coming to him when I paid him the thousand dollars; I gave them what they asked for; he did not say that it was all that was due to him. I had orders to pay it. I knew they were all partners together there in the mining, and that they were all interested in that company. I gave them this money for Mr. Greenberg as his partners.

[Testimony of J. F. Hobbes, for Plaintiff (in Rebuttal).]

J. F. HOBBS, called as a witness for plaintiff, in rebuttal, testified:

The deed that has been exhibited here, called the new deed, was drawn in 1911. I drew it. I met Mr. Lesamis in 1911; Greenberg introduced him; both gentlemen came in together; Mr. Greenberg said, "Mr. Hobbes, I want to introduce you to my partner, Mr. Lesamis." They discussed with me the question of the signing of that deed at that time. I read the deed over to Mr. Lesamis; it had been prepared before; I told him the difference between that and the original deed; in response, his language was quite broken, but I remember he said it was all right. I asked him, "Do you understand?" then he said, "Yes, it is all right." No persuasions or coercion was used. [230]

Cross-examination.

It is my impression that Greenberg had the deed drawn the fall previous. I think he mentioned the

(Testimony of J. F. Hobbes.)

matter to me. I think the fall previous Greenberg wanted me to prepare another document; to prepare a deed embodying the agreement, and to have it ready to be executed by Tyapay, Lesamis and Garbin. Greenberg did not tell Lesamis in my presence why he wanted the new deed. I told him the difference in the two instruments; told him why Greenberg wanted him to sign it. Greenberg also told him. I first read the new deed to him; there was something in that new deed that required an explanation; there was a difference between that deed and the original deed; I certainly told him the difference.

Q. Now, go on and explain the difference, when you were explaining the terms of the new deed, what did you tell him about the meaning of this language "That twenty-four thousand dollars is to be paid from the proceeds of said mining ground"—what did you tell him that meant?

A. I told him the difference between the two deeds.

Q. What did you tell him what that meant?

A. I did not segregate the clauses of the deed in talking it over with him. I told him the difference between that and the present deed, the one which they had executed, other than the explanation as to how it should be received from the net balances; he said he understood it all right.

I can't tell you whether those words were "gross [231] output," were in there, when they were inserted. If I prepared it myself personally I have forgotten the details of it at the present time.

(Testimony of J. F. Hobbes.)

Q. Did you understand what was meant by the gross output?

A. I don't know that I used those particular words; I presume that I know what is meant by "gross output." I know that I told Mr. Lesamis about those words; that is when the difference between that deed that was drawn and the first deed was discussed; that was the understanding there between all of us, but I wanted there to be no misunderstanding whatever. I wanted to be sure that it was correctly understood; sure it was to be applied on the purchase price so that they could not claim to understand it differently, that the remainder was to be applied on the purchase price.

Q. Did you say anything about his share, his one-fourth interest in the property was to go to pay the twenty-four thousand dollars balance?

A. Yes, sir.

Q. Did you explain that to him?

A. Yes, sir, I had no occasion to misrepresent that or any part of it.

Redirect Examination.

I think there was another reason which I had for making that deed, which I desire to state: As I recollect, the original deed was not acknowledged; there was no notary public up there to take the acknowledgment and I think there [232] was some question that might come up whether they filed the deed; it was the intention to file the deed for record and they desired to have it acknowledged; I am not sure whether I understood that it was made in order that

(Testimony of J. F. Hobbes.)

it might be filed at the same time.

Recross-examination.

I will state that this deed was made out, made for Mr. Tyapay to sign. He signed up and his acknowledgment was taken and the deed recorded in the form on the back of the deed, and subsequently when Lesamis came into the office I drew up a certificate of acknowledgment and attached it to the deed, and drew up a third certificate, as I understood that Mr. Garbin was still in Kiana and that the deed would be taken to him and his signature and acknowledgment received there.

I did not know anything about the affidavit; I do not remember that now, but I presume it was prepared in proper form.

Testimony closed. [233]

That thereupon, and during the same term, the Court filed its opinion in said cause, and thereafter filed its Findings of Fact and Conclusions of Law as appears on file and of record in said court.

And said defendants on their part duly presented and filed their objections to said Findings of Fact and Conclusions of Law; and also filed and presented proposed Findings of Fact and Conclusions of Law; that said objections of defendants were overruled and defendants duly excepted, and the Court having refused to find as requested by defendants, the defendants also duly excepted. [234]

Now, within the time allowed by law, the defendants present this, their proposed Bill of Exceptions,

and pray that the same be settled and allowed by the Court.

Dated this the 17th day of June, 1914, at Nome, Alaska.

G. J. LOMEN,

O. D. COCHRAN,

Attorneys for Defendants.

[Order Settling and Allowing Bill of Exceptions.]

The above and foregoing Bill of Exceptions having been served, filed and presented for settlement within the time allowed by law, and being now found full, true and correct, containing all of the evidence introduced at the trial, the same is now settled and allowed by the Judge who succeeded the Honorable C. D. Murane, the Judge who tried said cause; the evidence in said case having been taken by one C. J. Nunne, a stenographer, and transcribed by her.

Done in open court this 25 day of July, 1914, at Nome, Alaska.

J. R. TUCKER,

District Judge.

Service of the foregoing bill of exceptions is hereby admitted at Nome, Alaska, this 17th day of June, 1914.

J. F. HOBBS,

Of Attorney for Plff. [235]

No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Bill of Exceptions. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jun. 17,

1914. John Sundback, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Defendants. Refiled in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Jul. 25, 1914. G. A. Adams, Clerk. By J. A. B., Deputy. [236]

*In the District Court for the District of Alaska,
Second Division.*

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,
GEORGE STANLEY and SAM
SALLO,

Defendants.

**Notice [of Motion for Approval of Statement of
Evidence, Waiver of Notice and Consent to
Approval].**

To the Above-named Plaintiff, H. Greenberg, and to
William A. Gilmore, and J. F. Hobbes, His Attorneys.

YOU WILL PLEASE take notice that the defendants have lodged with the clerk of said court, and included in the bill of exceptions herein, a statement of the evidence essential to the decision of all questions presented by the appeal from the judgment herein, and that at the courtroom of said court in the courthouse in Nome, Alaska, on the 26th day of September, 1914, at ten o'clock A. M., the defendants above named, the appellants herein, will move the

said Court or the Judge thereof to approve said statement.

O. D. COCHRAN,
G. J. LOMEN,

Attorneys for Defendants.

Plaintiff hereby waives the above notice and consents to the approval of statement at any time.

WILLIAM A. GILMORE,
Of Attorneys for Plaintiff. [237]

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Notice. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 12, 1914. G. A. Adams, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Defendants. [238]

[Order Approving Statement of Evidence.]

*In the District Court for the District of Alaska,
Second Division.*

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY, and SAM
SALLO,

Defendants.

All the evidence essential to the decision of the questions presented by the appeal from the judgment

herein is presented in the bill of exceptions approved and filed herein, and the statement of evidence contained in said bill of exceptions, having been found by me to be true, complete and properly prepared, said statement is hereby approved.

Done in open court this 12th day of September, 1914.

J. R. TUCKER,
District Judge.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Approval of Statement of Evidence. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 12, 1914. G. A. Adams, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Defendants. [239]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY and SAM
SALLO,

Defendants.

Assignment of Errors.

Come now the defendants above named, and assign

the following errors upon which they will rely in prosecuting their appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment of said District Court made and entered on the 28th day of October, 1913; from the order of said Court denying defendants' motion to quash the execution issued on said judgment or to continue the sale under said execution, dated July 18th, 1914; and from the order confirming the sale on execution, dated September 5th, 1914.

I.

The Court erred in its first finding of fact in that the Court found that the sum of twenty-four thousand (\$24,000) dollars, the balance agreed to be paid by plaintiff for the undivided one-quarter interest mentioned, was to be paid from the net profits of the mining operations thereafter to be conducted upon the mining claims mentioned.

II.

The Court erred in its second finding of fact wherein it found that the defendants thereupon, and in pursuance of the terms of any written instrument, entered into the partnership [240] known as Klery Creek Mining Company and thereupon began mining operations upon the placer claims referred to.

III.

The Court erred in its third finding of fact wherein it found as follows:

“And the Court further finds that all of said mining claims were put into said mining copartnership as assets by said defendants, and thereupon the said Klery Creek Mining Company entered into posses-

sion of said claims and began to mine and operate the same as a mining copartnership.”

And further erred wherein it found, in said third finding of fact:

“That thereafter the said Klery Creek Mining Company operated said mining claims on said Klery Creek and vicinity, in the Noatak-Kobuk Recording District, between the said 19th day of March, 1910, and the first day of September, 1911.”

IV.

The Court erred in finding in its fourth finding of fact: “That on or about the first day of September, 1911, the said Klery Creek Mining Company executed several written leases upon several of the said mining claims above mentioned belonging to the said Klery Creek Mining Company.” And in further finding therein that “Certain stipulated royalties were reserved to be paid to the said mining copartnership.”

V.

The Court erred in finding that “The defendants Andy Garbin and Jack Lesamis, in violation of the terms and conditions of their copartnership, conveyed, without consideration to the said defendants George L. Stanley and Sam Sallo, all of their right, title and interest in the said Klery Creek Mining Company copartnership property.” [241]

VI.

The Court erred in finding that the royalties due or collected from the placer claims above mentioned under said leases, belonged to the Klery Creek Mining Company.

VII.

The Court erred in finding that there was any indebtedness of the Klery Creek Mining Company to Philip Murphy, assignee of Robinson-Magids & Company, and in finding that the same should be paid from the first proceeds of the assets and property of the said Klery Creek Mining Company.

VIII.

The Court erred in finding that the defendants are all insolvent.

IX.

The Court erred in finding that it was the intent and meaning of the parties in forming said copartnership that the said balance of \$24,000.00 was to be paid from the net profits from the mining operations of the copartnership property, and, having found such balance, the Court erred in not apportioning the same.

X.

The Court erred in finding that the allegations contained in the answers of the defendants, to wit, "That said balance payment was due from the first gold-dust extracted and taken from the undivided one-quarter interest in said mining property" are not supported by the evidence, and are untrue.

XI.

The Court erred in finding as conclusions of law, "That the mining claims mentioned in the complaint are liable for the debts of [242] the copartnership mentioned."

XII.

And in finding "That the balance of the purchase

price agreed to be paid by the plaintiff Greenberg should be paid from the profits of the copartnership property.”

XIII.

The Court erred in refusing to find as requested by defendants, that the plaintiff H. Greenberg is indebted to the defendants Stanley and Sallo in the sum of \$1200.00 on account of assessment work; and, if not, then that \$2400.00 are due said defendants, on such account, from the Klery Creek Mining Company.

XIV.

The Court erred in refusing to find that the mining copartnership known as the Klery Creek Mining Company was a partnership organized without any definite term,—was a partnership at will, and that the same was dissolved upon notice September 9th, 1910.

XV.

The Court erred in refusing to find that the balance of the twenty-four thousand (\$24,000.00) Dollars purchase money to be paid by H. Greenberg, plaintiff, is now due and owing from said plaintiff Greenberg to the defendants, and that said defendants have a lien upon the interest of Greenberg in said mining claims for the payment thereof.

XVI.

The Court erred in refusing to find as a conclusion of law that the defendants, on a sale of the partnership assets, could become bidders and, as against plaintiff, be credited with the amount due from plaintiff to them. [243]

XVII.

The Court erred in refusing to find as a conclusion of law that the amount realized on a sale of the premises, less the costs of this action and the expenses of sale, should remain in the custody of the Court until the final determination of any action or actions pending on behalf of any of the creditors of the Klery Creek Mining Company and until the further order of the Court.

XVIII.

The Court erred in refusing to find as a conclusion of law that defendants were entitled to a judgment against plaintiff for the amount found due as the balance of the unpaid purchase money agreed to be paid for the undivided one-quarter of the premises described in the complaint.

XIX.

The Court erred in refusing to find as a conclusion of law that defendants Stanley and Sallo have judgment against plaintiff for \$1200.00 on account of assessment work performed by them.

XXI.

The Court erred in entering its judgment herein; and said judgment was erroneous in this: that,

First: It was final in character, but entered before all partnership matters were disposed of, and without disposing of same.

- a. No opportunity was afforded creditors to present their claims.
- b. No provision was made for the collection of claims due the firm.
- c. No disposition of the attachment of the creditor

Murphy was made, and same was ignored.

- d. The claim of \$2400.00 of Stanley and Sallo, allowed in the [244] findings, was wholly forgotten. So also credit of Frank Lesamis as per testimony of Greenberg, \$1158.00.
- e. The claims of the partners *inter sese*, after exhausting partnership assets, were left undetermined.
- f. No apportionment was made of the balance of the twenty-four thousand dollars due defendants.
- g. No partner, master or receiver was appointed to take over the properties and wind up the partnership.
- h. The findings were made to operate as an interlocutory judgment of dissolution and partial accounting.

Second: It gives a preference to one creditor over another.

Third: It adjudicates a contested claim of an attaching creditor while the action thereon is still pending.

Fourth: It awards judgment and execution in favor of such creditor who is not a party to this action.

Fifth: It confers upon the clerk of said court judicial power to determine who the distributees of the proceeds of sale shall be, the "assigns" being undetermined.

Sixth: It is indefinite in the matter of the beneficiaries thereunder who are named in the disjunctive and not by name.

Seventh: It is indefinite as to whether the sale is to be subject to, or free from, the attachment lien.

Eighth: It assumes jurisdiction of property without taking it into custody.

Ninth: It is incomplete in that it does not adjudicate the rights of the partners as between themselves; and in failing to give judgment in favor of creditor partners.

Tenth: It is inconsistent in that it provides for payment of costs from proceeds of sale of partnership property and also awards judgment for costs against defendants personally. [245]

Eleventh: It is not justified by the findings of fact and conclusions of law.

Twelfth: It is based upon erroneous finding of fact and conclusions of law, as heretofore specified with reference to such findings and conclusions.

XXII.

The Court erred in denying defendants' motion to quash the Execution issued herein.

XXIII.

The Court erred in denying defendant's motion to continue on terms, the sale on execution herein, until the determination of the appeal from the judgment herein.

XXIV.

The Court erred in confirming the sale on Execution herein.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Defendant.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Assignment of Errors. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 12, 1914. G. A. Adams, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Defendants. [246]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY and SAM
SALLO,

Defendants.

Petition for an Order Allowing Appeal.

Come now the defendants above named, and feeling themselves aggrieved by the final judgment and decree made and entered in the above-entitled cause on the 28th day of October, 1913, in favor of the plaintiff and against the defendants, for a dissolution of partnership and an accounting, do hereby appeal from said final judgment and decree and from the whole and every part thereof, and do also appeal from the order of said Court dated July 18th, 1914, refusing to quash the Execution or to continue the sale thereunder; and from the order of said Court dated Sep-

tember 5th, 1914, confirming the sale on execution, to the United States Circuit Court of Appeals for the Ninth Circuit, and they pray that these their appeals may be allowed and that a transcript of the record and proceedings upon which said judgment and orders were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that said Court approve the bond on appeal herein in the penal sum of [247] two hundred and fifty (\$250.00) dollars.

Dated at Nome, Alaska, this 12th day of September, 1914.

O. D. COCHRAN,
G. J. LOMEN,
Attys. for Defts.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Petition for an Order Allowing Appeal. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 12, 1914. G. A. Adams, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Defendants.
[248]

*In the District Court for the District of Alaska,
Second Division.*

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY and SAM
SALLO,

Defendants.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Jack Lesamis, John Tyapay, Andy Garbin, George Stanley and Sam Sallo, as principals, and J. A. Bachelder and Ralph Lomen, as sureties, are held and firmly bound unto the plaintiff H. Greenberg, in the sum of Two Hundred and Fifty (\$250.00) Dollars to be paid to the said plaintiff, his heirs or assigns, to the payment of which well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 12th day of September, 1914.

The condition of the above undertaking and obligation is such that, WHEREAS, the above-named defendants have filed their petition for appeals from the final judgment made and entered herein on the 28th day of October, 1913, and from the order refusing to quash the execution herein or continue the sale thereunder, dated July 18th, 1914; from the

order confirming such sale, dated September 5th, 1914, and have taken [249] an appeal from said judgment and orders to the United States Circuit Court of Appeals for the Ninth Circuit, and from the whole of said judgment and orders, to reverse the same:

NOW, THEREFORE, if the above-named defendants Jack Lesamis, John Tyapay, Andy Garbin, George Stanley and Sam Sallo shall prosecute their said appeals to effect, and answer all costs if they fail to make good their said appeals, then this obligation shall be void; otherwise to remain in full force and effect.

JACK LESAMIS,
JOHN TYAPAY,
ANDY GARBIN,
GEORGE STANLEY,
SAM SALLO,

Principals.

By G. J. LOMEN and
O. D. COCHRAN,

Their Attorneys.

J. A. BACHELDER,
RALPH LOMEN,

Sureties. [250]

Territory of Alaska,
Cape Nome Precinct,—ss.

J. A. Bachelder and Ralph Lomen, being first duly sworn, each for himself deposes and says:

I am one of the sureties named in the above undertaking, and a resident of the District of Alaska; that I am not an attorney at law, marshal, deputy marshal,

clerk of any court, or other officer of any court, and am worth the sum of Two Hundred and Fifty Dollars over and above all just debts and liabilities, and exclusive of property exempt from execution.

J. A. BACHELDER.

RALPH LOMEN.

Subscribed and sworn to before me this the 12th day of September, 1914.

[Notarial Seal]

G. J. LOMEN,

Notary Public in and for the District of Alaska.

My commission expires on the 27th day of June, 1917.

Order.

The above and foregoing bond is hereby approved this 12th day of September, 1914.

J. R. TUCKER,

District Judge. [251]

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et als., Defendants. Undertaking on Appeal. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 12, 1914. G. A. Adams, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Defendants. Civil Bond Record, Vol. #5, page 369. C. [252]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY and SAM
SALLO,

Defendants.

Order Allowing Appeal.

Upon motion of O. D. Cochran and G. J. Lomen,
attorneys for defendants above named, it is

ORDERED, that the appeals to the United States
Circuit Court of Appeals for the Ninth Circuit, from
the final judgment and decree heretofore made and
entered upon the 28th day of October, 1913; from the
order denying defendants' motion to quash the execu-
tion or continue the sale thereunder, dated July 18th,
1914; and from the order confirming the sale on exe-
cution herein dated September 5th, 1914, are hereby
allowed.

Done in open court this the 12th day of September,
1914.

J. R. TUCKER,

District Judge. [253]

[Endorsed]: No. 2349. In the District Court for
the District of Alaska, Second Division. H. Green-
berg, Plaintiff, vs. Jack Lesamis et als., Defendants.
Order Allowing Appeal. Filed in the Office of the

Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 12, 1914. G. A. Adams, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Defendants. [254]

*In the District Court for the District of Alaska,
Second Division.*

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY and SAM
SALO,

Defendants.

**Certificate [of Clerk U. S. District Court as to
Execution, etc.]**

I, the undersigned, G. A. Adams, do hereby certify that I am the clerk of the above-entitled court; that an execution in the above-entitled action was returned and filed in my office on the 11th day of August, 1914; that no money was then nor has any money since been turned over to me as the proceeds of any sale on execution in said action, except proceeds of the sale of personal property, amounting to the sum of seventeen and 13/100 (\$17.13) dollars.

IN WITNESS WHEREOF I have hereunto set my hand and official seal this 5th day of October, 1914.

[Court Seal]

G. A. ADAMS,

Clerk, District Court for the District of Alaska, Second Division.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Certificate. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Oct. 5, 1914. G. A. Adams, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Defendants, Nome, Alaska. [255]

*In the District Court for the District of Alaska,
Second Division.*

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY and SAM
SALLO,

Defendants.

Praeipie [for Transcript of the Record].

To the Above-named Plaintiff, H. Greenberg, and to J. F. Hobbes and William A. Gilmore, His Attorneys, and to the Clerk of Said Court:

You will please take notice that the portions of the record to be incorporated into the transcript on the appeals herein, are the following, to wit:

The summons, complaint, answers, replies thereto, the supplemental answer and cross-complaint and reply thereto, opinion, findings of fact and conclusions of law of the Court, objections to findings and conclusions, defendants' proposed amendments to findings

and conclusions, orders thereon and exceptions thereto, the judgment and exceptions and objections thereto, the execution and return thereon, the motion to quash execution or continue the sale thereunder, the order thereon, the motion to confirm the sale on execution and the objections to the confirmation of such sale, and the order of confirmation and exception thereto, the Bill of Exceptions containing [256] a statement of the evidence and the approval of the Court, the assignment of errors, the petition, order, bond and citation on the appeals herein. The order extending time to file transcript and citation, of which lodged copies have been filed, will go out with said transcript to the United States Circuit Court of Appeals for the Ninth Circuit.

O. D. COCHRAN,

G. J. LOMEN,

Attorneys for Defendants.

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Praecipe. Filed in the Office of the Clerk of the District Court of Alaska, Second Division, at Nome. Sep. 12, 1914. G. A. Adams, Clerk. By ———, Deputy. G. J. Lomen and O. D. Cochran, Attorneys for Defendants. [257]

[Certificate of Clerk U. S. District Court to
Transcript of Record.]

*In the District Court for the District of Alaska,
Second Division.*

No. 2349.

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY and SAM
SALO,

Defendants.

I, G. A. Adams, Clerk of the District Court of Alaska, Second Division, do hereby certify that the foregoing typewritten pages, from 1 to 257, both inclusive, are a true and exact transcript of the Complaint, Summons, Answer of Stanley and Sallo, Answer of Garbin, Tyapay and Lesamis, Reply to Separate Answer of Jack Lesamis, John Tyapay and Andy Garbin, Reply to Separate Answer of George Stanley and Sam Sallo, Supplemental Answer and Cross-complaint, Reply and Answer to Supplemental Answer and Cross-complaint of Defendants George Stanley and Sam Sallo, Memo. Opinion, Findings of Fact and Conclusions of Law, Defendants' Exceptions to Findings, etc., Decree, Defendants' Objections and Exceptions to Judgment, Execution and Marshal's Return thereon, Motion, Affidavit and Stipulation *in re* quashing execution, Opinion, Motion for Confirmation of Sale, Objections to Confirmation

of Sale, Order Confirming Sale, Court Minutes of November 1, 1913 (Overruling Motion for New Trial, etc.), Court Minutes of February 14, 1914 (Overruling Second Motion for New Trial, etc.), Opinion Overruling Motion for New Trial, etc., Bill of Exceptions, Order Settling and Allowing [258] Bill of Exceptions, Notice *in re* Statement of Evidence, Approval of Statement of Evidence, Assignment of Errors, Petition for an Order Allowing Appeal, Undertaking on Appeal, Order Allowing Appeal, Certificate of Clerk *in re* money Returned on Execution, and Praecipe for Transcript on Appeal, in the case of H. Greenberg, Plaintiff, vs. Jack Lesamis, et al., Defendants, No. 2349—Civil, this Court, and of the whole thereof, as appears from the records and files in my office at Nome, Alaska; and further certify the original Order Enlarging Time to File Transcript on Appeal and the original Citation in the above-entitled cause are attached to this transcript.

Cost of transcript \$68.40, paid by G. J. Lomen, of Attorneys for Defendants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 24th day of October, A. D. 1914.

G. A. ADAMS,
Clerk. [259]

*In the District Court for the District of Alaska,
Second Division.*

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY, and SAM
SALLO,

Defendants.

Order Enlarging Time to File Record.

On motion of O. D. Cochran and G. J. Lomen, attorneys for defendants, and good cause appearing to the Court therefor, it is now hereby

ORDERED that the time for filing and docketing the transcript and record on the appeals in the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, is hereby extended to the 15th day of November, 1914.

Done in open court this the 12th day of September, 1914.

J. R. TUCKER,

District Judge. [260]

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis, et al., Defendants. Order Enlarging Time to File Record. [261]

*In the District Court for the District of Alaska,
Second Division.*

H. GREENBERG,

Plaintiff,

vs.

JACK LESAMIS, JOHN TYAPAY, ANDY
GARBIN, GEORGE STANLEY, and SAM
SALLO,

Defendants.

Citation.

District of Alaska,
Cape Nome Precinct,—ss.

The President of the United States of America, to H.
Greenberg, Plaintiff, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty days from the date of this citation, to wit, on the 12th day of October, 1914, pursuant to an order allowing the appeals herein entered in the office of the Clerk of the United States District Court for the District of Alaska, Second Division, from the final judgment made and entered herein on the 28th day of October, 1913, from the order denying defendants' motion to quash the execution herein or continue the sale thereunder, dated July 18th, 1914, and from the order confirming the sale on execution, dated September 5th, 1914; in that certain action wherein you, the said H. Greenberg, are plaintiff, and Jack Lesamis, John

Tyapay, Andy Garbin, [262] George Stanley and Sam Sallo are defendants, to show cause, if any there be, why the said final judgment and orders rendered against said defendants should not each and all be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 12th day of September, 1914, and of the Independence of the United States the one hundred and thirty-eighth.

J. R. TUCKER,
District Judge.

Attest my hand and seal of the United States District Court for the District of Alaska, Second Division, at the Clerk's office at Nome, Alaska, this 12th day of September, 1914.

[Seal] G. A. ADAMS,
Clerk of the District Court for the District of Alaska,
Second Division.

Service of the foregoing citation is hereby admitted this 12th day of Sept. 1914.

J. F. HOBBS,
Of Attys. for Plaintiff. [263]

[Endorsed]: No. 2349. In the District Court for the District of Alaska, Second Division. H. Greenberg, Plaintiff, vs. Jack Lesamis et al., Defendants. Citation. [264]

[Endorsed]: No. 2514. United States Circuit Court of Appeals for the Ninth Circuit. Jack Lesamis, John Tyapay, Andy Garbin, George Stanley and Sam Sallo, Appellants, vs. H. Greenberg, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Second Division.

Received and filed November 10, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

No. 2514.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN,
GEORGE STANLEY, and SAM SALLO,
Appellants,
vs.

H. GREENBERG,
Appellee.

BRIEF FOR APPELLANTS.

O. D. COCHRAN,
G. J. LOMEN,
THOS. R. WHITE,
Attorneys for Appellants.

Filed this.....day of February, 1915.

FRANK D. MONCKTON, Clerk.

By, Deputy Clerk.

No. 2514.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN, GEORGE STAN- LEY, and SAM SALLO,	}	<i>Appellants,</i>
vs.		
H. GREENBERG,	}	<i>Appellee.</i>

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This action for the dissolution of a mining co-partnership and for an accounting was commenced on November 1st, 1911. The case was tried on the complaint (Tr. 3), separate answer of George Stanley and Sam Sallo (Tr. 15), separate answer of Jack Lesamis, John Tyapay and Andy Garbin (Tr. 21), reply to separate answer of Jack Lesamis, John Tyapay and Andy Garbin (Tr. 31), reply to separate answer of George Stanley and Sam Sallo (Tr. 37),

cross-complaint of George Stanley and Sam Sallo (Tr. 40) and answer to the cross-complaint (Tr. 45).

This court on February 24th, 1913 (203 Fed., 678) affirmed an order of the lower court denying the plaintiff's motion for an injunction and the appointment of a receiver.

The present appeals on behalf of the defendants below bring up for review the decree of the lower court (Tr. 81) and incidentally the findings of fact and conclusions of law upon which the decree was based; also the order of that court denying defendants' motion to quash the execution issued under the decree or to continue the sale held under the execution (Tr. 103) and to set aside the order confirming the sale on execution (Tr. 122).

The evidence shows that on the 19th day of March, 1910, the plaintiff, Greenberg, entered into a written contract (Tr. 126) with the defendants, Lesamis, Tyapay and Garbin whereby it was agreed "H. Greenberg is and shall be a full fledged partner with the above mentioned parties & have one quarter undivided interest in all claims, lodes, water-rights, acquired, or to be acquired and owned by the above mentioned parties. It is further agreed that H. Greenberg is to furnish the above mentioned parties with provisions from time to time up to July, 1910."

On the same day Lesamis, Tyapay and Garbin conveyed by deed (Tr. 128) to Greenberg, his heirs and

assigns, a one-quarter undivided interest in all mining claims located, surveyed, recorded and held by them in the Noatak-Kobuk Mining District, Alaska (without other description), and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever of said grantors of, in or to said premises and every part thereof. The consideration expressed in the deed is \$30,000.00, \$6,000.00 cash "and the balance of 24,000 to be paid of the first money taken out of the ground."

Subsequently, on June 17th, 1911, after said parties had mined one of said claims for a season Greenberg caused to be prepared another deed (Tr. 141) naming the same grantors and grantee and induced Tyapay and Lesamis to execute it, representing to them that the two deeds were alike (Tr. 228), and that the second deed was wanted because the first was not acknowledged (Tr. 167). Garbin refused to sign the second deed (Tr. 199). The two deeds were not alike. The giving of the second deed was without consideration and signed by only two of the three grantors named therein.

In considering the questions involved on this appeal it will be necessary to construe these agreements for the purpose of determining the terms and duration of the partnership between Lesamis, Tyapay, Garbin and Greenberg; whether they held the mining claims, in which all were interested, as partnership

property or as tenants in common, and how and from what source the balance of the purchase price on the sale to Greenberg was to be paid.

The conduct of the parties throws little light upon the situation. It appears, however, that the parties operated under the name of Klery Creek Mining Company and mined Placer Claim No. 1 above on Klery Creek during the mining season of 1910 (Tr. 130) at a profit of about \$7,000.00 (Tr. 131). The profit was divided between Garbin, Lesamis and Tyapay, three of the partners (Tr. 131).

Greenberg's share, whatever it was, was to be delivered to his three partners to be applied upon the purchase price of Greenberg's interest in the mining claims. Greenberg took possession of all the gold and undertook to divide the season's profits among his three partners. Out of these profits he paid Tyapay, Lesamis and Garbin a part of what was due them (Tr. 158), and the balance due each of the three out of the profits was left as credits to the three individuals with Robinson, Magids & Company, a mercantile firm of which Greenberg was a member (Tr. 160). Defendants contend that this arrangement as to credits was wholly unauthorized by them (Tr. 214). It seems that Robinson, Magids & Company subsequently credited the Klery Creek Mining Company with the total amount of these individual credits (Tr. 205) in reduction of the alleged debt of the Klery Creek Mining Co. to Robinson, Magids & Co.,

incurred in mining operations during the season of 1911, which defendants claim were conducted by plaintiff on his individual account and not by the Klery Creek Mining Co. (Tr. 210, 211).

After the partial accounting of the proceeds of mining operations for 1910, Tyapay went to Europe and has never returned (Tr. 172, 224), Lesamis left Alaska and did not return to the mine until about the close of the season of 1911 (Tr. 224), Garbin was at the mine but claims to have been looking after his interests merely as tenant in common.

In 1911 Greenberg employed a foreman and the workmen upon the ground, paying their transportation, wages and sustenance, and used his mercantile firm of Robinson, Magids & Company as disbursing agents. The account rendered by said firm (Tr. 200) shows that all the bills amounting to about \$30,000.00, were paid by said firm, it receiving all the gold dust extracted amounting to \$8,628.30 and also gold dust of the value of \$1,158.58 belonging to one Frank Lesamis, the brother of Jack Lesamis. Robinson, Magids & Company in their account also credited the sums alleged to have been paid in by, or rather credited to, Lesamis, Tyapay and Garbin, amounting to \$2,001.00, and certain other smaller items. The account showing a balance in favor of Robinson, Magids & Company of \$17,124.00 (Tr. 206).

Before Tyapay departed for Europe Greenberg agreed to loan him \$3,000.000, of which sum Green-

berg actually paid him \$1,000.00 (Tr. 172). The balance was to be forwarded to Tyapay later. To secure this loan plaintiff took a mortgage for \$3,000.00 upon Tyapay's interest in the claims involved in this action and without having remitted to Tyapay the balance of the loan, though Tyapay wrote him for it (Tr. 152), foreclosed the mortgage for the whole amount of \$3,000.00, interest and costs (Tr. 172, 174). Greenberg thus became the owner of one-half of the claims in question.

No note of this transaction was taken by the court in the accounting (See decree, Tr. 85), nor did the court, in its accounting, recognize the undisputed claim of Frank Lesamis (Tr. 133), brother of Jack Lesamis, for \$1,158.00 appropriated by Greenberg and delivered to Robinson, Magids & Company and by them credited to the Klery Creek Mining Co. (Tr. 166).

In the fall of 1911 plaintiff and defendants executed as individuals certain leases (Tr. 136); royalties under which were to be paid to the lessors and not to the Klery Creek Mining Co. (Tr. 137); these leases were all in the same form. Royalties were collected by representatives of the individuals (Tr. 177, 195, 231).

Subsequently Stanley and Sallo, assignees of Garbin and Lesamis, performed assessment work upon the mining claims amounting in value to the sum of \$2,400.00 (Tr. 232). The court in this accounting

failed to credit this amount to anyone (Decree, Tr. 81), although the court in its opinion (Tr. 53) and findings of fact (Tr. 64) recognized their claims.

There was no interlocutory judgment entered in the action nor was any effort made to bring in the creditors of the alleged partnership, or to collect claims, or to pay debts, either through one of the partners or through a receiver.

At the time of the commencement of this action one Philip Murphy, as assignee of Robinson, Magids & Company, brought an action against the parties to this action, to recover advances made, and caused to be levied an attachment upon all of the properties in question herein (Tr. 62). Murphy was in the employ of plaintiff Greenberg (Tr. 235). His action was pending at the time of the trial of this action and is still pending and undetermined (Tr. 11).

Without a trial of the law action the court by its judgment herein made Philip Murphy a preferred judgment creditor and ordered a sale of the attached properties without discharging the attachment (Tr. 83). The court rendered its opinion (Tr. 50) and made and filed findings of fact and conclusions of law (Tr. 55). Defendants proposed amendments, made objections and took exceptions to the findings of fact and conclusions of law (Tr. 67). Judgment was entered (Tr. 81) and objections and exceptions to it made and filed (Tr. 86). Motions for a new trial were made and overruled (Tr. 103).

Without an order of court the clerk issued a writ of execution (Tr. 87), under which the United States Marshal, without making a levy upon the mining claims in question, proceeded to sell the same (Tr. 96). Defendants moved to quash the execution as wholly unauthorized or to postpone the sale pending an appeal from the judgment (Tr. 107). These motions were overruled (Tr. 113). On the coming in of the report of the sale defendants filed their objections to the confirmation of the sale, it appearing in addition to the objections urged against the execution and sale that the marshal returned the execution without delivering to the clerk of the court the sum of \$3,000.00 bid by Greenberg at said sale. The bid was not collected (Tr. 121). The marshal evidently treated plaintiff as standing in the shoes of Murphy or as a preferred creditor to the amount of his bid. Defendant's objections to the sale were overruled and the sale confirmed (Tr. 122).

SPECIFICATION OF ERRORS.

1. The court erred in finding that the \$24,000.00 balance of the purchase price agreed to be paid by appellee for an undivided quarter of the mining claims mentioned in the complaint were to be paid "from the net profits of the mining operations" (assignment of error No. 1), and "from the mining operations of the co-partnership property" (assignment of

error No. 9), and "from the profits of the co-partnership property" (assignment of error No. 12).

2. The court erred in finding that the placer claims mentioned were partnership assets (assignment of error No. 3).

3. The court erred in finding that the mining claims mentioned in the complaint were liable for the debts of the partnership (assignment of error No. 11).

4. The court erred in finding that leases were let by the partnership and that royalties were payable to the partnership (assignment of error No. 4).

5. The court erred in finding that the claim of Philip Murphy was a debt of the Klery Creek Mining Co. and in adjudicating said claim and giving it preference over the claims of other creditors (assignment of error No. 7).

6. The court having found in its opinion and findings that Stanley and Sallo representing Lesamis and Garbin were entitled to a credit for assessment work done on the claims erred in failing to recognize and allow this claim in the judgment (assignment of error Nos. 13 and 19).

7. The judgment or decree is erroneous in that it embodies the errors in the findings above specified and further as specified in the 21st assignment of error as follows:

It was final in character, but entered before all partnership matters were disposed of and without disposition of same.

- a. No opportunity was afforded creditors to present their claims.
- b. No provision was made for the collection of claims due the firm.
- c. No disposition of the attachment of the creditor Murphy was made, and the same was ignored.
- d. The claim of \$2,400.00 of Stanley and Sallo allowed in the findings, was wholly forgotten. So also credit of Frank Lesamis as per testimony of Greenberg, \$1,158.00.
- e. The claims of the partners *inter esse*, after exhausting partnership assets, were left undetermined.
- f. No apportionment was made of the balance of the twenty-four thousand dollars due defendants.
- g. No partner, master or receiver was appointed to take over the properties and wind up the partnership.
- h. The findings were made to operate as an interlocutory judgment of dissolution and partial accounting.
8. The court erred in denying defendants' motion

to quash the execution issued herein (assignment of error No. 22).

9. The court erred in denying defendants' motion to continue on terms the sale on execution herein until the determination of the appeal from the judgment herein (assignment of error No. 23).

10. The court erred in confirming the sale on execution herein (assignment of error No. 24).

THE \$24,000.00 BALANCE OF THE PURCHASE PRICE FOR THE QUARTER INTEREST SOLD TO GREENBERG WAS TO BE PAID OUT OF THE PROCEEDS OF THE QUARTER INTEREST.

Magids (who drew the partnership agreement and first deed) testified (Tr. 178): "They offered Greenberg a quarter interest in the ground. He pays them two thousand dollars in supplies up to July 10th, then six thousand dollars and twenty-four thousand dollars out of the profits of the ground," and again (Tr. 189): "the conversations and understandings were concluded before the instruments were drawn; they came to a full understanding . . . I asked a good many times if that was the agreement before to make it more plain and Mr. Garbin and Mr. Lesamis spoke up and said, 'We understand that we are to get twenty-four thousand dollars after the expenses are deducted; we don't expect you to pay before the expenses are deducted.'"

The first deed (Tr. 128) to Greenberg reads: "the
 "balance of twenty-four thousand to be paid of the
 "first money taken out of the ground," the only
 ground otherwise mentioned in the deed being "one
 quarter ($\frac{1}{4}$) undivided of all mining claims located,"
 etc.

The second deed, drawn by Greenberg's attorney,
 Hobbes (Tr. 141): "parties of the first part . . .
 "grant . . . unto the said party of the second
 "part . . . an undivided one-quarter interest of,
 "in and to all mining claims . . . (\$6,000.00 of
 "said consideration has been paid in cash and hereby
 "acknowledged; the remaining \$24,000.00 is to be
 "paid from the proceeds of said mining ground . . .
 "all the first gross output shall be applied to the pay-
 "ment of said \$24,000.00 after necessary expenses of
 "operating have been deducted)."

Greenberg testified (Tr. 125): "I told them that
 "I have not got any money to buy property with, none
 "at all, so they decided to take the money out of the
 "ground from the profit of the ground."

Garbin says (Tr. 208): "As I understood it the
 "twenty-four thousand dollars was to come from his
 "share. First moneys from the ground. He got not
 "one cent before he pay us twenty-four thousand
 "dollars from the ground from his share mining."

Lesamis testified (Tr. 222): "For selling the
 "ground quarter interest we got thirty thousand dol-
 "lars, six thousand dollars cash; twenty-four thou-

“sand dollars come out of the ground, from his share.”

The foregoing was the evidence on the question as to whether or not the twenty-four thousand dollars of the purchase price was to be paid out of the interest purchased by Greenberg or out of the interests of all of the mining partners.

It will be observed that no witness testified and no writing read that the purchase price was to be paid out of the proceeds of *all* of the ground belonging to the partners, the language used by the plaintiff's witnesses and in the deeds being that it was to be paid “out of the ground” which is entirely consistent with the testimony of defendants' witnesses that it was to be paid out of the interest in the ground purchased by Greenberg.

We respectfully submit that the findings of the court to the effect that the twenty-four thousand dollars balance of the purchase price due from Greenberg was to be paid from the net proceeds of the mining operations of the copartnership is not sustained by the evidence.

It would result from the court's finding, should it be affirmed, that this twenty-four thousand dollars would be paid out of the combined interests of Greenberg and the three men from whom he purchased, that is to say, that for a one-quarter interest in their mining claims, these three miners would receive on the purchase price of \$30,000.00, \$6,000.00 in cash and \$24,000.00 more, out of what they and

appellee mined out of the claims, including the interest they had sold to appellant. The three sellers would thus get for this undivided one-quarter interest \$6,000.00 in cash and \$6,000.00 more out of the quarter interest sold as the full purchase price of the quarter interest. The other \$18,000.00 of the purchase price of \$30,000.00 they would pay themselves out of their own interests in the mines, so that Greenberg would secure his interest for \$12,000.00 instead of the expressed consideration of \$30,000.00 which he agreed to pay.

The trial court recognized the reasonableness of the contention of defendants when stating in the opinion (Tr. 52), "If it were not for the interpretation placed upon the instruments by the defendants as indicated by their settlement in the fall of 1910, and by the subsequent deed executed by two of the defendants, and the general conduct of all the defendants the court would be inclined to construe the contracts to mean that the \$24,000.00 balance of the purchase price should be paid from the proceeds of plaintiff's one-fourth interest."

We are at a loss to understand to what "general conduct" the court refers.

THE MINING CLAIMS WERE NOT PARTNERSHIP PROPERTY BUT WERE HELD BY GREENBERG, TYAPAY, LESAMIS AND GARBIN AS TENANTS IN COMMON, AND SHOULD HAVE BEEN ADMINISTERED UPON AS THEIR INDIVIDUAL PROPERTY.

Against this contention there appears to be no evidence; in its favor we have (1) the contract of partnership (Tr. 4), where the language used is "Greenberg is and shall be a full fledged partner with the above mentioned parties *and* have one-fourth interest in all claims"; (2) from the deed (Tr. 5) given to Greenberg conveying to him "*his heirs and assigns* one-quarter ($\frac{1}{4}$) undivided of all mining claims"; (3) the second deed (Tr. 141) to Greenberg, dated June 17, 1911, signed by Tyapay and Lesamis, which conveyed to "said party of the second part and to his heirs and assigns an undivided one-quarter interest of, in and to all mining claims"; (4) the leases (Tr. 136) which were given September 1st, 1911, "by and between H. Greenberg, J. Lesamis, Andy Garbin, John Tyapay, by H. Greenberg his attorney in fact, parties of the first part, Lessees," and signed by each lessee individually providing for royalties to be paid the individuals with no mention anywhere in the instrument of the partnership. One-half the royalties were collected on behalf of Garbin, and Lesamis (Tr. 177) and one-half by the agent of Greenberg and Tyapay; (5) Tyapay gave Greenberg

a mortgage on his individual interest in the claims (Tr. 164, 173, 174), which Greenberg foreclosed against Tyapay as an individual under a judgment for \$2,000.00 more than he had a right to and concerning which Greenberg testified (Tr. 174): "I admit that judgment against Tyapay is wrong in amount. I am willing to deed it back to him after he pays this debt"; (6) on December 17, 1912, Greenberg and Tyapay, by Sam Magids, sent a letter to Lesamis (Tr. 229), in which they offered to pay their share of the expense of doing the assessment work if Lesamis had done it, saying, that if the affidavits in proof of the labor having been done were not filed by December 22nd "we will send up men to do the work *for us*," and no mention of the Klery Creek Mining Company was made in the communication. (7) The testimony of Sam Magids, who was plaintiff's witness and the man who drew the partnership agreement and the first deed. Mr. Magids testified (Tr. 178): "I was present when negotiations toward forming a partnership were had; I heard what was said on both sides; they were dickering there for a night and a day or two days; they were explaining that they were in need of money—had no money to go ahead and develop the ground—I mean Tyapay, Garbin and Lesamis; they asked Greenberg and me to extend them credit; this was refused; finally they made an offer to sell one-half of the ground and after talking it over finally came to an agreement;

“ Mr. Greenberg was to furnish supplies up to July 10th; *they offered Greenberg a quarter interest in the GROUND*; he pays them two thousand dollars in supplies up to July 10th, then six thousand dollars and twenty-four thousand dollars out of the profits of the ground. Garbin, Lesamis and Tyapay were to have charge of the working and handle it to suit themselves; writings were made out and signed; I wrote the instruments” (Tr. 189). “The conversations and understandings were concluded before the instruments were drawn; they came to a full understanding.” (8) The mining claims were not purchased with partnership funds and were never entered in the partnership books as partnership assets or as part of the capital stock.

“Real estate belonging to a partnership will in equity be treated like its personal funds and distributed accordingly. If the title stands in the name of one of the partners he will be held as a trustee of the partnership and be made to account to the other partners according to their several rights and interests; but it by no means follows that real estate used for partnership purposes is partnership property. A contrary presumption prevails when the title is not in the firm and to rebut that presumption it must appear either that it was paid for with the firm money or was by agreement actually brought into the common stock.”

“These principles are applicable to all classes of trading and commercial partners. That the same rules govern mining partnerships is quite apparent.”

Lindley on Mines, 3rd Ed., Sec. 802.

"All persons having an undivided interest in real property are to be deemed and considered tenants in common."

Compiled Laws of Alaska, Sec. 488.

"The partnership may exist between tenants in common of land in conducting business thereon, without affecting the legal status of the land.

"And it is a recognized rule of law in such cases that where the conduct and acts of the parties in dealing with the estate may with reason be referred to the office of a tenant in common, the courts in construing these acts will prefer to attribute them to that relation."

Holton vs. Guinn, 76 Fed., 96, 100;

Thompson vs. Bowman, 6 Wall., 317; 18 L. Ed., 736.

"Property may be used for partnership purposes and not belong to the partnership. It may belong either to a third person, to one of the partners, or to the partners as tenants in common.

"A deed of realty to partners if unexplained, vests in them undivided interests as tenants in common."

Grant vs. Bannister, 160 Cal., 774, 780.

"In order to transform real estate from its usual character into personality the intention to do so should be made very clearly to appear and the circumstances relied on to evidence such transformation must be such as fairly to exclude every con-

struction under which the property can retain its usual characteristic of realty.”

Thompson vs. Holden, 117 Mo., 127; 22 S. W., 907.

“Creditors of the individuals would have the first right against property of the individuals and joint creditors the first right against the partnership property.”

Rodgers vs. Meranda, 7 Oh. St., 180;

Murrill et al. vs. Neill et al., 8 How., 414.

If the real estate did not become partnership property the court should not have administered it as such. The court did not only so administer it but found that the \$24,000.00 due from Greenberg was payable out of the partnership assets.

THE LEASES WERE LET BY INDIVIDUALS AND NOT BY A PARTNERSHIP.

The leases let on the mining claims in the fall of 1911 were given on the different claims to different persons, but were all signed in the same manner as the one in evidence (Tr. 136), to wit: “H. Greenberg (Seal); Jack Lesamis (Seal); Andy Garbin (Seal); John Tapay (Seal), by H. Greenberg, His Atty. in Fact.” The lease in evidence reads (Tr. 136):

“This agreement made & entered into this 1st day of Sept. 1911, by and between H. Greenberg,

J. Lasamis, Andy Garbin, John Tapay, by H. Greenberg, his attorney in fact, parties of the first part, Lessees, and Mike Boskovitch and Paul Krietz, parties of the second part, Lessees, Witnesseth:" etc.

Stanley and Sallo collected from the lessees \$1,300.00 royalty, this representing the shares due to Garbin and Lesamis (Tr. 177), and Levy, bookkeeper for Robinson, Magids & Co., representing Tyapay and Greenberg, collected \$1,300.00 royalty, which Magids says he received (Tr. 195).

THE COURT ERRED IN FINDING THAT THE CLAIM OF ROBINSON, MAGIDS & CO., OR THEIR ASSIGNEE, PHILIP MURPHY, WAS A DEBT OF THE KLERY CREEK MINING COMPANY, AND ERRED IN ADJUDICATING SAID CLAIM AND GIVING IT PREFERENCE OVER OTHER CREDITORS.

Defendants contend that the evidence shows that the working co-partnership admitted to have been in existence in 1910, was dissolved in September of that year, and that thereafter plaintiff mined on his own account, and the claim of Robinson, Magids & Co. should have been charged against him and not against the partnership. This is borne out by the testimony of the witnesses Lesamis and Garbin, and by the circumstances of the case (Tr. 223, 211). Tyapay, in the fall of 1910, left for Europe and never returned (Tr. 224); before leaving he mortgaged his property

to plaintiff (Tr. 172). He also gave plaintiff a power-of-attorney to look after his interests (Tr. 146). Defendant Lesamis also departed from Alaska and did not return until a few days before the close of mining operations in 1911 (Tr. 224). Garbin, it is true, remained on the ground, but testifies that he was looking after his interests, while assisting Greenberg's foreman, Mr. Fleming (Tr. 211). Greenberg's firm, Robinson, Magids & Co., seems to have paid all the bills and received all the gold dust. The disbursements amounted to something like \$26,271.70 and the total receipts from gold dust to \$9,786.88 (Tr. 64). With such large advances on the part of Robinson, Magids & Co., the amount taxed up to the defendants for future expenses, \$667.00 each (Tr. 192), would seem to be a mere bagatelle, and if authorized at all, which appellants deny, must have been a credit on individual account.

The fact that the deficit in 1911 was so great, while in 1910, when the defendants were operating, there was a considerable profit, would indicate that some one else was in charge in 1911.

Again, the books of Robinson, Magids & Co. seemed to have furnished at all times all the data regarding the operations in 1911. Not so with reference to the operations of 1910.

As a partner in the firm of Robinson, Magids & Co., plaintiff could not bring an action against the alleged Klery Creek Mining Company, of which

plaintiff was also an alleged partner. It was therefore arranged that plaintiff's clerk, also clerk of Robinson, Magids & Co., one Philip Murphy, should bring an action on account of Robinson, Magids & Co. against the Klery Creek Mining Company. Such action was commenced and an attachment levied on said claims, which action is still pending and undetermined; and this action brought by Murphy was made to serve as a pretext for plaintiff to bring the present action. The proceedings throughout and the result of the present action show an intimate relation between Greenberg, Murphy and Robinson, Magids & Co. This relation was so close that the trial court, by its decree, authorized the clerk of the court to apply the proceeds of the sale on execution to the payment of the claims of Robinson, Magids & Co. *or to Philip Murphy*, and the U. S. marshal, at the time of the sale on execution, allowed Greenberg to bid in the property for \$3,000.00 without paying the amount bid, evidently treating Greenberg, Murphy and Robinson, Magids & Co. as one and the same person.

From the undisputed testimony of Greenberg (Tr. 133, 165) and Lesamis (Tr. 224, 225), it appears that gold dust of the value of \$1,158.00 belonging to Frank Lesamis, a brother of defendant, Jack Lesamis, was taken and appropriated to the use of the Klery Creek Mining Company. This gold dust seems to have been mingled with the dust belonging to the

partnership and treated as a part of the partnership gold. It was never paid back by the partnership, nor did any one of the partners receive any credit for it in the accounting. In the decree of the court it is not even mentioned. If any claim was to be preferred, this one should have been, for the money was used to pay for labor done on the claims (Tr. 165). At any rate, this claim of Frank Lesamis should have been given an equal chance with the claim of Robinson, Magids & Co.

We do not know what other creditors the partnership may have. They have never been given an opportunity to make themselves known.

THE COURT HAVING FOUND IN ITS OPINION AND FINDINGS THAT STANLEY AND SALLO, REPRESENTING LESAMIS AND GARBIN, WERE ENTITLED TO A CREDIT FOR ASSESSMENT WORK DONE ON THE MINING CLAIMS, ERRED IN FAILING TO RECOGNIZE OR ALLOW THIS CREDIT IN ITS DECREE.

In the opinion filed, the trial court said (Tr. 53):

“In view of the fact that defendants Stanley and Sallo appear to hold the title in trust for Lesamis and Garbin, any work done by them for the purpose of protecting the title and preventing a forfeiture should be allowed in the final accounting.”

And this finding was made (Tr. 64):

“The court further finds that the defendants in the years 1911 and 1912, in order to prevent a

forfeiture, did the annual assessment work on certain claims mentioned in paragraph V. of the supplemental answer and cross-complaint of defendants Stanley and Sallo of the total value of \$2,400.00, and that said amount is chargeable as indebtedness against the said Klery Creek Mining Company and the defendants are entitled to be credited with the same."

This credit was not referred to in the decree and payment is not in any way therein provided for.

THE DECREE WAS FINAL IN CHARACTER, BUT ENTERED BEFORE ALL PARTNERSHIP MATTERS WERE DISPOSED OF AND WITHOUT DISPOSITION OF SAME.

There was no interlocutory decree entered in this case. There was no winding up of the partnership matters through any referee or any of the alleged partners. No notice was given to creditors and no accounting was made as between the individual partners. Robinson, Magids & Co., or perhaps Philip Murphy, was made a preferred creditor, sharing in the distribution of the proceeds of the partnership assets before judgment in the law action and without discharging the attachment. The decree entered was final in form.

If plaintiff operated on his own account in 1911, or, if the real estate was not brought into the partnership, or, if the twenty-four thousand dollars were to be paid out of plaintiff's quarter interest, then the decree ordering a sale of the properties and distri-

bution of its proceeds in the manner adjudged, must be held to be erroneous.

But, whether erroneous in above respects or not, it is erroneous because Robinson, Magids & Company were, by the decree, made preferred judgment creditors while their claim was in litigation in a law action, and without discharging their attachment in said action.

Said decree was erroneous for the further reason that it does not adjudicate the rights of the parties among themselves.

It is apparent from the testimony, that the plaintiff Greenberg was indebted to the defendants on account of his purchase of the one-quarter interest above mentioned. In such case, judgment should be entered in their favor after a full and complete accounting of the partnership affairs.

As was said in the case of *Albery vs. Geis*, 82 Pac., 262, 1 Cal. App., 381:

“The recitals in the finding do not show that any account has been taken of outstanding indebtedness the firm might be owing to any other person, nor of any claims the firm may have had against any person, nor of any firm assets, other than those mentioned in said finding, and no statement or finding that all the assets had been exhausted. An accounting means that there is to be a complete winding up of the affairs of the partnership.”

The decree rendered purports to be final, and is therefore appealable:

Harrison vs. Clarke, 164 Fed., 539.

Because plaintiff brings this action and asks for a sale of the properties, his contract to pay on bed-rock was superseded, and he should pay the purchase price.

Pritchard vs. McLeod, 205 Fed., 24;

Harrison vs. Clarke, 164 Fed., 539.

In *Pritchard vs. McLeod*, *ante*, this court went into a full discussion of the rule in such cases. There should have been a personal judgment against the plaintiff. As it was, the claim of defendants was placed at the foot of items entitled to participate in the proceeds of the lands decreed to be sold, and they were left to take the chance of the sufficiency of said proceeds and without a judgment over against the plaintiff.

If defendants be held to be partners of plaintiff, they are entitled, in the final accounting, to have an adjustment of the capital stock.

Plaintiff did not contribute his share. By the sale of the properties his share of the indebtedness to Robinson, Magids & Company was partially wiped out and his own indebtedness to the defendants completely wiped out. Defendants were not even allowed credit for the two thousand and one dollars (Tr. 205, 193)

appropriated by Robinson, Magids & Company, nor for assessment work performed by them (Tr. 64).

By the account of Robinson, Magids & Company (Tr. 205) it appears that two thousand and one dollars were paid on the outfit delivered May, 1911. By Magids' testimony (Tr. 192, 193), it appears that this two thousand and one dollars was paid by Garbin, Lesamis and Tyapay, out of their proceeds of the operations of 1910. Greenberg paid no part of it (Tr. 194).

In the findings of fact (Tr. 64) we find:

“The total expense for the year 1911 was \$26,271.70,
 “and the total gold production for the year 1911,
 “amounted to \$9,786.88, leaving an indebtedness due
 “the Robinson, Magids & Company, or its assignee,
 “of \$16,484.82 on the first day of September, 1911,
 “with legal interest to date amounting to \$2,830.12”;
 and the decree (Tr. 82) provides that the partnership is indebted to Murphy in the sum of \$19,314.94. Thus the defendants in the court's accounting received no-benefit whatsoever because of the \$2,001.00 they had advanced toward the 1911 expenses, the court taking into consideration only the total expense and the total “gold production” of that season. Greenberg was nowhere made to contribute his share of this \$2,001.00.

THE COURT ERRED IN DENYING DEFENDANTS' MOTIONS TO QUASH THE EXECUTION; TO ADJOURN THE SALE; AND AGAINST THE CONFIRMATION OF THE SALE.

Defendants contend that there is no authority in the clerk of the court to issue execution on the judgment herein. Section 1097 of the Compiled Statutes of Alaska provides in what cases execution may issue, to wit, on judgments for the payment of money or for delivery of real or personal property, and that executions are only three kinds, to wit: against property of a judgment debtor or against his person, or for the delivery of real or personal property.

Such executions are not adapted to execute the judgment in this action. The enforcement of judgments in equity cases depends upon the judgment and orders of the court, or, as provided for in Sections 1213, 1214, of the Compiled Statutes of Alaska. It will be readily seen that the nature of the judgment in this action does not require or admit of the sale on execution provided for in said Section 1097.

Indeed, the judgment itself provides that the sale contemplated shall be made on the order of the court (Tr. 84). The order so contemplated is not any order contained in the decree or judgment, but a subsequent order which it is fair to presume would provide for the time, place and manner of sale; the terms of sale; whether the property should be sold in parcels, or as a whole, and whether on credit or

for cash, and what notice of sale should be given and for a conveyance to the purchaser.

This is but following the practice in federal courts.

Act of March 3rd, 1893, Revised Statutes
1901, page 710;

Freeman on Execution, Par. 274, and notes;

Gray vs. Brignardello (U. S.), 17 L. Ed., 692;
68 U. S., 627.

But it is not only because of want of authority in the marshal to proceed to a sale of the premises in question that plaintiff objects to the sale and notice thereof in the present instance; the affidavit (Tr. 109) on which the motion was based recites that no levy has been made upon the premises in question. Section 1106 of the Compiled Statutes provides that execution shall be levied in like manner as a judgment, to wit: that real property shall be levied upon by leaving with the occupant, or if no occupant, then in a conspicuous place on the premises, a copy of the writ, and said section in the fifth subdivision also provides that until a levy the property shall not be affected by the execution. No counter-affidavit was served, and we assume that the facts are as stated in the affidavit.

The Alaska Statute differs from that of most States, and like that of California, requires a levy before sale.

Freeman on Executions, Secs. 280, 280a;

Compiled Statutes of Alaska, Sec. 1106.

Under the Alaska Statute and Practice (Section 1585, Compiled Statutes), a receiver should have been appointed "to dispose of the property according to the judgment."

Without an order of the court, and probably without a receiver and the taking of the property into the custody of the court, no conveyance or transfer of the title is provided for or can be made.

The judgment is void on its face for uncertainty and cannot support an execution or be enforced.

The court should, on the grounds stated in the affidavit in support of the motion herein, and on authority have postponed the sale though it did not quash the execution. This would seem to be the practice of the courts where an appeal without supersedeas from the decree of sale is pending or is about to be taken.

Beach, Modern Eq. Pr., Section 905;

Bound vs. Railway Co., 55 Fed., 186.

Where the interests of the parties require it, the court will postpone the sale:

Maxmedous Land Co. vs. McGorock, 96 Vir., 131; 30 S. E., 460.

In view of the want of authority on part of the marshal, however, it would have been far better and more practical to quash the execution and thus prevent a sale under a void writ and prevent litigation, to set aside a void sale.

A motion to quash execution may be made at any time:

Freeman on Execution, Sec. 76.

The rule that where there is an adequate remedy at law, equity will not interfere, has no application to a motion of this kind, but only to actions or suits calling for the exercise of the jurisdiction of a court as an original proposition.

Greenberg bid in the property sold for the sum of \$3,000.00. The amount of the bid was not returned by the marshal with the execution (Tr. 96). In fact, it was never collected by the marshal (Tr. 121), he evidently treating Greenberg as standing in the shoes of the creditor Murphy, or as a preferred creditor to the amount of his bid. Despite these facts, the sale to Greenberg, one of the partners, largely indebted to other creditors of the partnership and to his other partners, was confirmed and a conveyance directed to be made to him (Tr. 123).

Finally: this appeal presents a case in which the plaintiff, appellee, is shown to have secured to himself a quarter interest in certain mining claims upon the payment of only a small portion of the purchase price; another quarter interest in said mining claims by foreclosure of a fraudulent mortgage; the benefit of the assessment work of his co-tenants without contribution; gold dust belonging to others without accounting therefor; a discharge of personal debts by

loading them upon an alleged co-partnership; a conversion of property, held in private ownership, into partnership capital and then absorbing it without money and without price.

By the judgment and sale thereunder, the private property of appellants has been dissipated and their just claims ignored; a stranger to the action has been made a preferred judgment creditor, and other creditors have been left out of consideration; costs were awarded to plaintiff and made a charge against specific property; and, also against the defendants personally.

All of which not only suggests error, but that a great injustice has been done.

Respectfully submitted.

O. D. COCHRAN,
G. J. LOMEN,
THOS. R. WHITE,
Attorneys for Appellants.

IN THE
United States Circuit Court of Appeals 7
For the Ninth Circuit

JACK LESAMIS, JOHN TYAPAY, ANDY GARBIN, GEORGE STAN- LEY and SAM SALLO,	} <i>Appellants,</i>
VS.	
H. GREENBERG,	} <i>Appellee.</i>

BRIEF FOR APPELLEE.

WILLIAM A. GILMORE,
Central Building, Seattle, Washington,
Attorney for Appellee.

Filed this.....day of March, 1915.

Filed

FRANK D. MONCKTON, *Clerk.*

By MAR 3 - 1915 *Deputy Clerk.*

F. D. Monckton,

No. 2514

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK LESAMIS, JOHN TYAPAY,
ANDY GARBIN, GEORGE STAN-
LEY and SAM SALLO,

Appellants,

VS.

H. GREENBERG,

Appellee.

BRIEF FOR APPELLEE.

Statement of the Case.

This is a suit for an accounting and a dissolution of a mining copartnership. The undisputed facts admitted in the pleadings or disclosed in the transcript show that on or about the 19th day of March, 1910, the plaintiff in the Court below, hereinafter referred to as the appellee, and the defendants, Jack Lesamis, John Tyapay, and Andy Garbin, in the Court below hereinafter referred to as the appellants, entered into a mining copartnership to own, mine, and operate as a mining copartnership certain mining claims then owned by the appellants in the

Noatak-Kobuk Mining District, Alaska, and thereupon, on said date evidenced their mining copartnership by executing and delivering two written instruments set out in full in plaintiff's complaint, and later in the evidence, wherein and whereby the appellee became an equal mining partner in the mining claims and mining operations with the appellants, upon terms and conditions set out in said instrument.

Thereafter the partnership was named the Klery Creek Mining Company, and mining operations were begun on some of said mining claims by said mining copartnership. It is admitted that the appellee furnished the groceries and provisions mentioned in the agreement approximately \$2,000 worth at his own cost and expense, and that he paid the sum of \$6,000 by checks to the said appellants. That during the spring and summer of 1910, the gold production of said mining company was approximately \$16,251.42, and that the total expense during said time was approximately \$8,959.75, leaving the net profit of a little over \$7,000. It is admitted from the fall of 1910 to the suspension of mining work in the fall of 1911, the total gold production amounted to \$9,786.88 which included \$1158.58 received from Jack Lesamis and Garbin (Tr. 206), while the total expenses for that period was \$26,271.70 or a loss of over \$16,000.

It is admitted that in the fall of 1911, certain mining leases were executed on several of the mining claims. It is admitted that on or about

the 2nd day of September, 1911, the appellants, Garbin and Lesamis conveyed by deeds their interest in the mining claims in controversy to appellants George Stanley and Sam Sallo in trust, and without any valuable consideration, and in disregard of the indebtedness then outstanding. It is admitted that Robinson, Magids & Co., who had assigned their claim to one Philip Murphy, was the sole creditor. Said Robinson, Magids & Co., having acted as treasurer or disbursing agent for the Klery Creek Mining Company, and having paid all the labor bills, supplies and groceries, and advanced necessary money for other expenses to the amount of nearly \$30,000, some of which had been paid by gold dust, leaving approximately at the time the suit was instituted, between \$17,000 and \$18,000.

It is admitted that on the 24th day of October, 1911, said Philip Murphy attached the mining claims to secure the payment of the said indebtedness.

The disputed questions raised by the pleadings and evidence in the transcript were as follows:

(1) The meaning and intention of the parties as to how the appellants were to be paid the contingent payment of \$24,000 expressed in the written agreement of March 19, 1910, Greenberg contending that appellants were to receive the first \$24,000 net profits over and above all working expenses, while the appellants contended that they were

to receive the \$24,000 out of one-quarter of the gross output of the mining claims, and later in a supplementary answer, contending that the money was due because Greenberg did not mine it from the mining claims.

(2) The appellants contended that the mining copartnership was dissolved in September, 1910, while Greenberg contended that no dissolution of partnership ever occurred.

(3) Appellants Stanley and Sallo contend they were bona fide purchasers and owners of the interests conveyed, while Greenberg contends that they became trustees of Garbin and Lesamis and that their deeds were fraudulent and void as against him.

(4) Greenberg contends that the leases executed in the fall of 1911 were executed for the Klery Creek Mining Company, while the defendants contend that the leases were executed only as co-tenants.

The case was tried before the Court in the fall of 1913, and on the 21st day of October, 1913, the Court filed its written opinion (Tr. p. 50). Thereafter on the 28th day of October, 1913, the Court made, entered and filed its findings in favor of appellee, and subsequently on the 28th day of October, 1913, entered its decree (Tr. p. 81) in favor of the appellee and against the appellants.

Specifications of Errors.

The appellants, after assigning a large number of alleged errors committed by the trial Court, have abandoned most of the assignments, and confine most of their attack upon the decree entered by the Court. They contend:

(1) That the Court erred in finding from the evidence that the balance of \$24,000 was to be paid out of the net proceeds of the mining operations.

(2) That the Court erred in finding that the mining claims were brought into the partnership.

(3) That the Court erred in finding that the claim of Robinson, Magids & Co., or their assignee, Philip Murphy, was a debt of the Klery Creek Mining Company.

(4) That the Court failed to credit the appellants with the item of assessment work done on the mining claims in the Court's accounting.

(5) That the decree was final in character, but entered before all partnership matters were disposed of; and,

(6) That the Court erred in refusing and denying appellant's various motions to quash the execution, adjourn the sale, etc.

Since the appellants have neglected to discuss any other alleged errors assigned, we will confine our discussion of the evidence and the law to the same assignments raised by appellants in their brief.

Argument.

In order to fully understand the fallacy of the contentions of appellants in attacking the Court's decree, we deem it best to take up considerable time of the Court in reviewing the evidence disclosed in the transcript, so far as there is any conflict on the disputed points raised in the pleadings and at the trial, in order to show this Court that the trial Court made the proper findings and decree under the evidence, and that said findings are thoroughly borne out and supported by the weight of the evidence.

It is seldom that a case contested as hotly as this one has been, and involving so large a record, has so few disputed points.

This case was before the Circuit Court on a former appeal.

Greenberg v. Lesamis et al., 203 Fed. 678.

The case came up to this Court upon the appellee herein appealing from the lower Court's order refusing him an injunction and a receiver. At that time, the transcript disclosed practically the same showing that is before the Court now. Exhaustive depositions were in the record, together with several affidavits on either side, raising practically the same questions in dispute that this record shows.

This Court, on page 680 of its opinion, says:

“It appears *prima facie* that a copartnership was entered into as alleged by the plaintiff; that said copartnership was not dissolved

September 9, 1910, as claimed by the defendants, but continued in force and effect at least until Garbin and Lesamis sold, conveyed and assigned to Stanley and Sallo their several interests in the mining claims, and in all rights and privileges in and concerning the mining and copartnership property, which took place September 2, 1911. The evidence would seem to indicate, further, *prima facie*, at least, that these deeds were not executed in entire good faith, as no consideration was paid by the grantees. It further appears that Greenberg has a good cause of suit for dissolution of the copartnership and for an accounting."

We submit that this is now the law of this case, and that the trial Court was obliged to take this opinion of the Court as the law governing the trial, and that the questions of whether or not the plaintiff's complaint stated a good cause of action, or whether or not there was or was not a dissolution in the fall of 1910, and whether or not the deeds to Stanley and Sallo were *bona fide*, and whether or not Greenberg was or was not entitled to an accounting, were all settled by this Court in its opinion on the former appeal.

We contend that there was but one issue to be determined at the trial on the merits in the Court below, and that was for the Court to make and render an accounting between the partners. Our contention is that under the opinion of this Court in the former appeal, there was but one question open for determination, and that was the accounting between the parties.

However, whether or not this Court now takes the view that the decision in the former appeal should govern as the law, and preclude the appellants from now raising on this appeal any of the points enumerated and discusses in the former appeal, we assert that the transcript discloses a much stronger case in favor of appellee on all of these questions than the transcript on the preliminary motions. In other words, the transcript abounds with testimony that shows (1) that there never was a dissolution of the mining copartnership; (2) that Stanley and Sallo obtained their deeds from the other appellants without any consideration whatever, and solely to harass and defraud the appellee, and at all times were the trustees of said appellants; (3) that appellee was entitled to an accounting and a sale of the assets of the partnership, and a distribution thereof as prayed for in his complaint.

We contend that the record in this case discloses that the Court took and heard the evidence of all accounts, claims and demands due or owing the said mining copartnership, and considered all accounts and claims between the various partners.

The assets of the partnership consisted of the mining claims mentioned in the complaint and the gold dust extracted from the mining claims during the two years of operations, together with some of the royalty subsequently received, while the only indebtedness of the Klery Creek Mining Company was

the Robinson, Magids Co. debt, which had been assigned to Philip Murphy.

That this is so, we cite the Court to paragraph XII of the answer of Jack Lesamis, John Tyapay and Andy Garbin, on page 29 of the transcript, which reads as follows:

“These defendants further allege that the only indebtedness of the Klery Creek Mining Company is a small amount in favor of S. B. Marshall and Kayhill in the sum of \$2.50, and that these defendants are abundantly able to pay the same.”

The record shows that this item was not a partnership debt, so that the only creditor that the Klery Creek Mining Company had was the said Robinson, Magids Company.

The plaintiff offered several witnesses, who testified as to the accounting as well as itemized statements (see Tr. 183-186; also Tr. 200-206) showing the financial condition of the Klery Creek Mining Company as to debits and credits, while the defendants stood by at the trial without offering any proof whatever to aid the Court in rendering an accounting either as to the expense account or the amount of gold extracted, while now they are before this Court complaining that the accounting rendered by the Court in its opinion, findings and decree, is not correct.

We will next consider the assigned errors as presented by appellants in their brief. First, they contend that the Court erred in finding against them,

and in favor of Greenberg, that the \$24,000 balance payment of the purchase price was to be paid out of the proceeds of the gross net profits of the mining operations. Let us consider whether or not the evidence adduced in the record on this point sustains the trial Court. The expression used in the agreement (Tr. p. 5), which was drawn by Sam Magids, a witness called at the trial, was as follows:

“The balance of \$24,000 to be paid of the first money taken out of the ground.”

This, we concede, was rather ambiguous, and needed explaining, but explanation is found in the documents, letters, telegrams, acts and subsequent conduct of all the parties.

Greenberg testified (Tr. p. 125) as follows:

“I told them that I have not got any money to buy property with, none at all, so they decided to take the money out of the ground, from the profits of the ground, if I will give them a start to go ahead and work the ground with, that they knew they could take it out of the profits of the ground in one year; that all they wanted was to get a chance to get it opened up; so I agreed to give them \$2000 worth of supplies. They were perfectly willing to take the money out of the ground if they were able to get supplies to operate on, and then this balance to be taken from the profits of their mining. I accepted that offer, I furnished them with groceries and provisions, mining tools, etc. There was to be paid \$6000 in all, and a balance of \$24,000 in addition to furnishing \$2000 worth of supplies. I paid the defendants, Lesamis,

Tyapay, and Garbin \$6000 by checks on the bank; they cashed these checks; the balance of \$24,000 was to be paid when the money comes out of the profits—out of the ground from operating the mines; no time was stated at all, just when the money comes out.”

Again Greenberg says (Tr. p. 131):

“The profits for the year 1910 were seven thousand, three hundred ninety-one and fifty-two hundredths dollars; the profit was divided between the three partners, Garbin, Lesamis and Tyapay. I did not get a cent, because that was the agreement that we had at the time I made the deal with them. I was to give them the profits above expenses and to take up the \$6000 and then the balance was to be taken from the profits to pay the \$30,000, which I was to give them for the fourth interest. They made no demand or protest against this division of the profits; they were satisfied; neither of the defendants claimed or made any demand that he was entitled to one-third of the gross proceeds.”

On page 141 of the transcript, the Court will find a deed executed by John Tyapay and Jack Lesamis, executed on the 17th of June, 1911, which Greenberg contends was executed for a double purpose; first, to more clearly define the manner or method of payment of the balance of the money, and, second, so that the deed could be acknowledged and recorded as required by the laws of Alaska. This deed was intended to be signed by Garbin also, but he subsequently refused after consulting George Stanley, one of the appellants, who was acting as his legal

adviser in the mining camp where they lived. This deed provides that:

“ALL OF THE FIRST GROSS OUTPUT shall be applied to the payment of said \$24,000 after necessary expenses of operating have been deducted.”

The Court will notice this deed was executed and delivered long before any trouble arose between the partners. The appellants in their brief contend that this deed was coerced or forced by Greenberg from the appellants, but we ask the Court to consider the testimony of the witness Judge Hobbes, who testified that he read the deed and explained it to both of them before they signed it (Tr. pp. 237, 238).

See also Greenberg's testimony (Tr. pp. 159-163).

The witness Sam Magids, who was present when the agreement was made between the partners, and who wrote the memorandum of agreement and deed of March 19, 1910, at Klery Creek, testified as follows with reference to the meaning of the agreement (Tr. p. 178).

“They offered Greenberg a quarter interest in the ground; he pays them \$2000 in supplies up to July 10, then \$6000 and \$24,000 out of the profits of the ground. Garbin and Lesamis and Tyapay were to have charge of the work and handle it to suit themselves; writings were made out and signed; I wrote the instruments offered in evidence, a memorandum and deed; I wrote them; there was no lawyer in the vicinity, etc.”

Sam Magids testified as follows (Tr. p. 179):

“I was present some time in December, when one settlement was had between Garbin and Mr. Greenberg; that was after Mr. Greenberg had got back from Nome; I participated in the adjustment or settlement of their mining operations; I made a statement for them showing the total gross amount of gold taken out and the total expenses of their mining operations; this statement I figured out for Mr. Garbin and Mr. Greenberg to show how much money Mr. Garbin had coming to him on his third profit of the mining from the Klery Creek Mining Company; Mr. Fox was also present; Mr. Garbin was satisfied with this adjustment; he accepted it as correct; we settled with him right there on that basis; Greenberg was satisfied with it; I got my figures from the Klery Creek Mining Company's books; I got the figures off the books; Mr. Fox kept the books.”

Again Magids testified (Tr. p. 180):

“Garbin said it was to be divided between the three; he claimed one-third of the profit, Tya-pay and Lesamis were to have their two-thirds; they did not claim one-third of the gross.”

Again Magids testified (Tr. 189) as follows:

“Q. Why didn't you embody in the partnership agreement the terms of the partnership?

A. I asked a good many times if that was the agreement before, before to make it more plain, and Mr. Garbin and Mr. Lesamis spoke up and said, ‘We understand that we are to get \$24,000 after the expenses are deducted’. Those are just the words they were used.”

There is not a single statement or shred of evidence offered in the transcript that shows that the

appellants ever contended or claimed that they were entitled to the gross amount of gold extracted under their partnership agreement until after the partnership dispute arose in the fall of 1911, or about the time this suit was instituted. Andy Garbin, one of the appellants, in testifying, quite frankly admitted as follows (Tr. p. 214):

“Bob Fox had charge of the work during the summer of 1910; Lesamis, Tyapay and I were there also; Greenberg got interest in all while we was a partnership; in all we had before—we were all to put up expenses for that year; we sent orders to the store in Kiana for what we wanted; Greenberg was there; we did not know anything about that Magids Company; we got \$3000 or \$4000 worth; the rest of the expenses went for labor; we were all to pay for it; we were to take it from the gold dust. The rest was profit; the three of us got that; we three—Greenberg was to get nothing.”

In view of these facts in the record, how can this Court come to any other conclusion on the facts than that the trial Court, in finding that the balance of the purchase money of \$24,000 was to be paid out of the net profits of the mining operations of the partnership, did not commit any error in so finding.

We next consider the questions raised by appellants as to whether or not the mining claims involved in the controversy were or were not partnership property.

The trial Court found that the placer mining claims mentioned in the complaint and subsequently

sold on execution were the partnership assets brought into the partnership under the scope and meaning of the partnership agreement.

If there was any real dispute in the record on these questions, we would feel inclined to discuss it at length, but we deem it enough to call the Court's attention to the testimony of Jack Lesamis, one of the appellants, on this question, which evidence alone, aside from the general language, meaning and intent of the partnership agreement, would be sufficient to sustain the finding of the lower Court against the appellants. Jack Lesamis (Tr. p. 226) testified as follows:

“We had a partnership agreement at the time we made the deal with Greenberg. In that partnership we put the claims in jointly and worked as a partnership. We then took Greenberg as a one-quarter partner. He was to put up all the groceries until July; give us \$6000 and the balance out of his share in the ground. At that time the claims were all in the partnership.”

The agreement (Tr. p. 5) recites as follows:

“H. Greenberg is, and shall be a full-fledged partner with the above mentioned parties & have one-quarter undivided interest in all claims, lodes, water rights, acquired or to be acquired and owned by the above mentioned parties.”

Our contention is that all of the mining property described was brought into the partnership to hold in trust in the names of the partners for the uses and purposes of the partnership. This being so, the

law cited by appellants in their brief on pages 17, 18, and 19 has no application whatever, and the authorities are not in point. The leases were signed by the individual members of the partnership because the legal title stood in their names for the Klery Creek Mining Company. But the record clearly discloses that it was the Klery Creek Mining Company that gave the leases.

“The mining ground belonging to and worked by a mining partnership, and acquired for mining purposes, whether purchased with partnership funds or brought into the concern by individual members as a portion of the capital stock, is, in equity, for the purpose of a settlement of the partnership affairs, to be treated as partnership property.”

Lindley on Mines, Vol. 3, Sec. 802;

Duryea v. Burt, 28 Cal. 569.

“Where land is brought into a partnership as stock, it is, as between the partners, their creditors, and one who has knowingly dealt with them for it, personalty belonging to the firm.”

Lindley on Mines, *ibid.*, Sec. 802;

West Hickory M. Ass’n v. Reed, 80 Pac. 38.

All of the mining property mentioned in the complaint was by the partnership agreement impressed with the character of partnership property, and could only be divested of that character by a dissolution of the same.

The case of *Holton v. Guinn*, 76 Fed. 96, cited by appellant is not authority in this case. There the Court found as a matter of fact that it was the

plainly stated intent of the parties that there was no partnership in the land, but that they were tenants in common. Of course, we are not confronted here with any such finding.

We have no quarrel with counsel on the proposition of law that realty may be used for partnership purposes and not belong to the partnership, but that principle of law is not involved here. We contend that the intention to transform these mining claims into the character of partnership property was not only clearly expressed in the contract, but was actually done at the time by the appellants.

This Court on the former appeal, *Greenberg v. Lesamis*, 203 Fed. at page 680, says:

“The mining claims are made a subject of litigation, being specifically described in the complaint. Whoever deals with such claims must deal with them with notice and knowledge of the suit pending concerning them.”

This Court considered the mining claims just as the Court below did, as having been brought into the partnership by the partnership agreement which was of record, and notice to any one when dealing with the mining claims described in the complaint in this suit. We submit there is ample proof in the record to sustain the finding of the lower Court in this regard.

We next consider the assignment of appellants that the Court erred in finding that the claim of Robinson, Magids & Co. or their assignee, Philip

Murphy, was a debt of the Klery Creek Mining Company.

This Court, as observed before, has already, on the former appeal, held that there was ample evidence to show that there was no dissolution of the partnership in 1910. Consequently, the mining operations conducted that winter and the following summer were the mining operations of the Klery Creek Mining Company, and the record abounds in testimony to support this contention.

Greenberg testified (Tr. p. 132) as follows:

“During the winter and spring of 1910-1911, they worked, prospecting, and doing assessment work for the Klery Creek Mining Company on the claims mentioned in the agreement. Mr. Garbin was there; he was there for himself and also was there for the other partners. I was not there myself. Garbin hired the men, Robinson, Magids & Co. paid the bills, acting as treasurer employed by the Klery Creek Mining Company as a sort of clearing house.”

We direct the Court's attention to plaintiff's exhibit “I” (Tr. p. 174), being a letter dated June 14, 1911, from Andy Garbin to Mr. John Lichtenberg, Keewalik, Alaska, reading as follows:

“Dear Sir: Send the following telegram at your earliest chance: ‘Greenberg, Lesamis, Tyapay, care Bessie Store, Nome. Send forty men to our camp at Klery. No men to be had here. Andy Garbin.’”

And again, see plaintiff's exhibit “F” (Tr. p. 149), being a telegram dated July 7, 1911, reading as follows:

“Candle, Alaska, July 7, 1911. Greenberg, Lesamis & Tyapay, Nome. Send forty men to our camp at Klery. No men to be had here. A. Garbin, by H. Robinson.”

Is not this almost conclusive proof alone that the partnership was not dissolved, but that the partners through Andy Garbin were then mining and operating in the summer of 1911 at Klery Creek? But we again direct the Court's attention to plaintiff's exhibit “G” (Tr. p. 150), being a letter from John Tyapay and Jack Lesamis, dated October 20, 1910, to Mr. Greenberg, wherein it is specifically stated as follows:

“You tell to Mr. R. H. Fox that, let 'im stard early in neckst spring that would lose no time as this we dit this last spring.”

This letter shows clearly on the face of it, that the partnership was not dissolved, but was to be continued to next spring under Mr. Fox as foreman, or some other good man, as they suggested in the letter. See also plaintiff's exhibit “H” (Tr. p. 152), which was a letter bearing date February 20, 1912, and after this suit was instituted being a letter from John Tyapay to Mr. Greenberg, wherein he states as follows:

“I gade (got) telegraph from lawyers from Mr. Cohran and Mr. Lowmen that has suit entred to dissolve (brek) partnership. That a bad news, when you people cannot to gade long. Who is that fellow who stard the trouble?”

Now this letter, bear in mind, was written in 1912 and long after the Robinson, Magids & Co. indebt-

edness had been incurred, showing how ridiculous it is to contend that the partnership was dissolved and that the Robinson, Magids & Co. indebtedness was the personal indebtedness of Greenberg.

We also direct the Court's attention to the testimony of Greenberg (Tr. p. 175), where he says that upon receipt of the telegram from Candle, he and Murphy discussed the matter of hiring the men with Jack Lesamis, and then employed the men and sent them up to the mines.

See, also, the testimony of Philip Murphy (Tr. p. 234); also Tr. p. 176, where Andy Garbin admits that he had the custody of the gold and kept the key to the strong box.

Greenberg, testifying (Tr. p. 157), says:

“Robinson, Magids & Co. are interested with me—in business with me; they are not interested with me in these mining claims.”

See also transcript, page 196, where Greenberg testified:

“Robinson, Magids & Co. have no interest in the Klery Creek Mining Company, and never had. I am liable to my partners personally for the indebtedness to the Klery Creek Mining Company. It was all charged up to me personally.”

See also the testimony of W. L. Levy (Tr. p. 198):

“I kept the books for Robinson, Magids & Co. Stuart Fleming kept the books for Klery Creek Mining Company. The Klery Creek Mining Company purchased their provisions

and supplies at our store. The time checks were paid at our store.”

The record abounds in testimony that is undisputed, and uncontrovertible that all the mining operations were conducted by the Klery Creek Mining Company, and that the Robinson, Magids Company paid the bills for labor, supplies, etc., and was the only creditor that the Klery Creek Mining Company had.

Plaintiff's exhibit “M” (Tr. p. 200), prepared by Levy, the bookkeeper, shows that Robinson, Magids & Co., during the second year of the partnership was a creditor to the total amount of \$29,898.91, which indebtedness was reduced by certain credits to an amount claimed by the Robinson, Magids Co., or Philip Murphy, assignee, in the fall of 1911, of \$17,124. The Court found in the accounting between the partners and the admissions of Levy and others that this indebtedness was further reduced to the sum of \$16,484.82, said reduction occurring on account of certain royalties that had been received by Levy for the Klery Creek Mining Company and paid over to the Robinson, Magids Company on its indebtedness.

In order to find that the Court erred in finding that this debt was not the debt of the Klery Creek Mining Company, this Court would have to find from the record that a dissolution of partnership had occurred in 1910, and that the debt was Greenberg's personal debt.

“Necessarily the dissatisfied partner must give to his associates fair and unequivocal notice of his withdrawal, and to protect himself from future liability as to creditors with whom the partnership had been theretofore accustomed to deal, a like notice to such creditors must be given.”

Lindley on Mines, Vol. 3, Sec. 803;

Slater v. Haas, 25 Pac. 1089;

Madar v. Norman, 92 Pac. 572.

The fraudulent sale to Sallo and Stanley did not dissolve the partnership.

Kahn v. Central Smelting Co., 102 U. S. 641.

See, also, *Lindley on Mines*, Vol. 3, Sec. 803, and cases therein cited.

Appellants in their brief complain that the Court did not allow for the assessment work done by Stanley and Sallo. Appellants are in error on this point, because while it is not specifically stated in the decree, yet it was considered and allowed by the Court. The Court found that Stanley and Sallo were trustees acting for Garbin and Lesamis, and found that the \$2400 worth of work done by them was done for the four partners, \$600 of which Greenberg would have to make good. The Court, instead of directing Greenberg to pay this \$600 over to the appellants, charged it against Greenberg, thereby increasing his proportion of the remaining indebtedness far in excess of the individual indebtedness of appellants.

It is further contended by appellants that the decree was entered prematurely or before all partnership matters were disposed of.

The appellee submitted all the evidence within his reach to show and inform the Court of the exact amount of the gold production and the exact amount of expenses and aided and assisted the Court in every way within his power to arrive at a correct accounting. On the other hand, the appellants did everything within their power to prevent an accounting, resisting appellee's efforts to reach a correct accounting, and resisting appellee's efforts to have a receiver appointed to collect the royalty and any other assets.

The appellants are not in a very good position before this Court to complain of error on the part of the trial Court, so far as its findings on the accounting are concerned. The Court, in its opinion (Tr. pp. 53, 54), and again in its findings of fact (Tr. pp. 63, 64, 65) rendered a very clear and explicit account of all of the amounts due by each partner. In doing so, the Court considered all of the evidence that was submitted. The Court found that Lesamis had received \$1000, and was indebted to the partnership for \$726, for gold dust appropriated and loaned to one Moran, and found that Tyapay had received \$2000, and Andy Garbin, including nuggets, the sum of \$1512.12. The Court further considered and allowed the item of \$2001 advanced toward the 1911 expenses, because in the findings of fact (Tr. p. 64) the Court specifically names the credits that each of the parties had at the beginning of 1911, Lesamis having \$737.89, Tyapay \$463.89, and Garbin \$951.70.

The Court, in reaching its final conclusion on the accounting, found that the gold dust for 1911 amounted to \$9786.88. In doing this, the Court took the amount of gold dust extracted by the partnership (Tr. 206), which amounted to \$8628.30, and added to it the \$1158.58 borrowed by Jack Lesamis from his brother, Frank Lesamis. By this method, the Court charged the \$1158.58 against Lesamis and Garbin, who borrowed it from Frank Lesamis, but gave Robinson, Magids & Co. credit, thereby reducing the Klery Creek Mining Company indebtedness to Robinson, Magids & Co. in the sum of \$1158.58 (Tr. 206). It is in evidence that Andy Garbin received 50 ounces of gold dust, which he did not return or account to the partnership for. In addition to this, it is in evidence (Tr. pp. 168, 195) that there was \$2000 worth of provisions and supplies left on the premises at the close of mining in 1911 at the time this suit was instituted.

These provisions and supplies were left with Garbin and Lesamis to sell and apply the proceeds to the reduction of the indebtedness of the Klery Creek Mining Company. The evidence shows that Lesamis and Garbin converted this property to their own use and never accounted for it to the Klery Creek Mining Company in any manner.

The appellant Stanley (Tr. p. 232) testified as follows:

“The royalties collected by Mr. Sallo were not paid to Robinson, Magids & Co.; they were for his interest in the leases. I paid Garbin

his share of the royalties collected under the leases.”

The Court, in arriving at the accounting between the partners, charged the gold dust loan to one Moran against Jack Lesamis; the nuggets and 50 ounces of gold obtained by Garbin against him; the \$2000 worth of provisions and supplies converted by Lesamis and Garbin against them. The Court allowed Lesamis and Garbin a credit for the money they had coming at the beginning of operations in 1911 and allowed them a credit for the gold dust that the record shows (Tr. p. 206) that they got from Frank Lesamis. From all of these various items the Court in its findings (Tr. pp. 64, 65) found that instead of each of the partners owing the sum of \$4828.73, that Jack Lesamis owed the sum of \$4429.21, Tyapay \$4703.21, Garbin \$4215.40, and Greenberg the sum of \$5967.10. The reason Greenberg was indebted in such a large sum was that the Court charged against him in favor of his partners \$600 for his share of the \$2400 assessment work done by Stanley and Sallo, and found that Greenberg was entitled to bear his proportionate share of the amount credited at the beginning of operations in 1911, which Greenberg had not advanced. So far as the royalty is concerned, it is in evidence that the appellants collected and kept one-half of the royalty and never accounted for the same to the Klery Creek Mining Company in any manner whatever. On the other hand, it is in evidence that the royalty collected by Greenberg's rep-

representatives was applied on the reduction of the Robinson, Magids Co. indebtedness, so that Greenberg is really the one that should be complaining of the unfairness of this portion of the accounting instead of appellants. If the Court made any error whatever, in reaching the final amounts that each partner owed on the outstanding indebtedness, it could not amount to very much one way or the other, and certainly the royalty collected by the appellants and kept by them, amounting to some \$1300, would offset and overcome any error that the Court might have made against them.

The Court, in reaching this accounting, certainly believed the position of the appellants taken in their answer where they denied that there was any partnership indebtedness at all and the Court, from all the evidence offered, could come to no other conclusion that the only creditor that the Klery Creek Mining Company had was Robinson, Magids & Co., or their assignee, Philip Murphy, in the total sum of \$19,314.94, being principal and interest up to the time of the accounting.

The mortgage deal between Tyapay and Greenberg was a personal transaction, and had nothing to do with the partnership affairs. It is only emphasized now by appellants, as in the lower Court, to attempt to prejudice the Court against appellee. The record shows Tyapay can get his interest any time, by refunding or repaying Greenberg the money loaned or for a good deal less.

The appellants, in their brief, contend that there should have been an interlocutory decree entered in this case. We submit that the findings of the Court, together with its conclusions of law, this being an equity case, was ample so far as the accounting was concerned, and as the accounts were not complicated, a reference of the matter to a referee was unnecessary, and therefore a report of a referee unnecessary.

Appellants rely upon the case of *Albery v. Geis*, 82 Pac. 262, as an authority that the decree was erroneous for the reason that it does not adjudicate the rights of the parties among themselves. The case of *Albery v. Geis* was reversed because the findings were inadequate and did not show that any accounting had been taken and a personal judgment was entered. Surely this case would not be good law where the findings are adequate and exhaustive and the record shows that the Court had gone into all of the details of the partnership and had taken the evidence on every phase of the case as to all of the output or assets and of all the debts of the concern.

In the *Albery v. Geis* case, the findings were very meager and wholly inadequate. In this suit, we did not ask for a personal judgment against the appellants, but we did ask the Court to sell the assets and distribute the same, which the Court has done. The rule is correctly stated in Section 971 of *Vol. 2 of Bates on Partnership*:

“No personal decree is to be rendered against individual partners until the assets have been

converted into money; that is to say, the excess of receipts by a partner over his disbursements is not to be ordered paid in by him to the receiver before the assets have been exhausted, but is a mere item to be debited to him on the final balance."

Appellants contend that Greenberg should be compelled to pay the balance of \$24,000 because he has not taken it out of the ground within a reasonable time, citing to the Court the case of *Pritchard v. McLeod*, 205 Fed. 24; and *Harrison v. Clarke*, 164 Fed. 539.

These cases are not in point, and certainly do not sustain the contention of appellants. In the *Pritchard* case, McLeod agreed to operate the mines and pay Pritchard 25% of the gross to the total of \$25,000. Four years elapsed, and McLeod did not operate or pay. The Court held an implied obligation to work the mines or pay Pritchard within a reasonable time.

In the case at bar, a partnership was formed, and a duty devolved upon the appellants as well as the appellee to mine and operate the ground. The deferred payment was to come out of the net profit from the mining operations. Not only did the appellants refuse to aid the appellee to take the money from the mining claims, but they resisted his efforts and claimed the partnership was dissolved and refused to join him in operating. Besides, it is in evidence that numerous leases were let on the claims and were in full force at the time this suit was tried, and that the appellants were collecting

the royalty and appropriating it to their own use, notwithstanding the fact that appellee had applied to the Court for a receiver, which had been denied him in the lower Court and the ruling affirmed in this Court on the former appeal.

The case of *Harrison v. Clarke*, supra, was a case where the defendant, without justification or excuse, repudiated the contract entered into and refused to make the advances required, thereby terminating the enterprise. In its facts, this case was entirely dissimilar from the case at bar, and cannot be considered as authority.

The appellants contend that the trial Court erred in denying their various motions, to quash the execution; to adjourn the sale; and against the confirmation of the sale.

On this assignment, we cite the Court to the opinions of the trial Court found in the transcript, pages 105 and 113, and the cases therein cited.

The appellants contend that the Court should have entered some preliminary order between the entering of the decree and the granting of the writ of execution or that the United States Marshal should have made a levy on the mining property sold. This position is certainly untenable.

See *Vol. 2, Freeman on Executions*, Sec. 280, page 1587, where the rule is stated as follows:

“If the sale has been ordered by a Court of Chancery under a suit in which all the parties in interest were before the Court, there is no need of any levy, for the right to sell the land

has attached as a consequence of the proceedings in the suit.”

In the case at bar, the mining claims were set forth and described in the complaint, and were embraced within the partnership contract. All the interested parties were before the Court. The Court, in its decree (Tr. p. 84), specifically orders, adjudges and decrees that the United States Marshal for the District of Alaska, Second Division, sell the whole of said assets, both personal and real, in the said decree as described under order and execution of the Court in this action in the manner provided by law, and to pay the proceeds into Court for distribution. Certainly, this being an equitable case, the Court had jurisdiction of the property of the parties and had the right to direct the marshal to sell the property in the manner provided in the decree.

There was nothing left to be done but the ministerial act by the clerk of issuing the writ of execution to the marshal, who proceeded and sold the property in the manner provided for the public sale of property in Alaska, as the transcript shows.

The only object that the appellants could have in having a levy made by the marshal would be to have Stanley and Sallo come into Court and contend that their rights preceded the levy. That is probably why they are complaining because no levy was made.

As the lower Court well said:

“Counsel for defendants failed to distinguish between a proceeding at law and a proceeding in equity” (Tr. p. 113).

There is nothing in the Compiled Statutes of Alaska that interferes with an equity Court selling the assets, real and personal, of a partnership as was done in this case.

The case of *Gray v. Brignardello*, 68 U. S. 627, relied upon by appellants, was a case where the decree was interlocutory and provided that the Commissioner appointed by the Court should make certain reports, and after these reports were approved by the Court, and after the further order of the Court, the Commissioner was to sell the property. In disregard of all this, the Commissioner proceeded and made a sale. The sale was held to be contrary to law, and set aside.

In the case at bar, there were no reports to be made, no Commissioner has been appointed, the Court had made its own findings instead of appointing a Commissioner, and had entered its final decree directing the marshal to sell the property according to law, the same as is done in all executions.

The practice is well defined in the Courts of Alaska under the Compiled Laws of Alaska, and when the marshal makes a sale under an execution, the marshal or the clerk distributes the proceeds of the sale as provided in the decree, purely as ministerial acts. The Court does not lose jurisdiction of

the case, but at all times can see that its judgment or decree is carried out.

“Unlike a judgment at law on which execution issues, the decree of a Court of Chancery is itself the authority of the officer to sell.”

24 Cyc., page 10.

See, also,

Karnes v. Harper, 48 Ill. 527.

“The order or decree must conform to the general requirements of law respecting the form of orders, decrees, and judgments, of Courts. It must describe the property to be sold, and specify in certain and precise language the duties to be performed by the Court’s officer.”

24 Cyc., page 10, and note with cases cited.

Appellants rely upon the case of *Bound v. Railway Co.*, 55 Fed. 186, as authority that the Court should have postponed the sale pending this appeal. This case is ably discussed and distinguished by the lower Court in its opinion denying the appellants’ motion to postpone the sale (Tr. p. 114). The trial Court denied the motion to postpone the sale because no appeal was pending at that time. The appellants were threatening to appeal and wanted a postponement contingent upon taking an appeal for a period of twelve months. The lower Court held that to grant the motion of appellants would be to nullify Section 1007, R. S. U. S., or tantamount to making a *nunc pro tunc* order effectual for the purpose of a supersedeas. If such a motion should be granted it would be establishing a prac-

tice that every time a litigant was defeated he could threaten to appeal and apply to the Court for a stay of proceedings for one year, nullifying the law applicable to supersedeas. It certainly should not take a great deal of argument to expose the lack of logic and reason in appellant's contention.

The transcript shows that the sale was a public sale and the appellants had the same right to bid for the property that appellee had. The record also disclosed from the amount of assessment work done that a large proportion of the claims have been allowed to lapse and forfeit to the Government, and with the exception of a few of the claims a great portion of the acreage is now public domain open for the appellants or any one else to locate under the laws pertaining to mining claims.

The transcript shows that but very few of all of the placer claims enumerated in the complaint have been kept alive by annual representation or assessment work, and the few claims that remain are not considered of any great value.

This is certainly shown by the fact that the operations for 1911 resulted so disastrously to the Klery Creek Mining Company, while the royalty collected since the suit was instituted all told amounted to about \$2500, being 25% of the gross output for two years. The record shows that all of the appellants are insolvent and unable to pay their proportion of the indebtedness. On the other hand, the record shows that Greenberg is solvent; the record further shows that the Klery Creek Mining Company is

indebted to Robinson, Magids & Co., of which Greenberg is the third owner, in the sum of \$19,314.94 for money, groceries and supplies advanced and paid for said mining company. Greenberg is responsible for this amount in an accounting with his partners in the mercantile firm of Robinson, Magids & Co., as the transcript shows they have no interest whatever in his mining ventures.

The appellants, in closing their brief, complain very bitterly of the fact that they have lost their interest in the mining claims, and see nothing but poverty and ruin staring them in the face. They fail to remember and recall that when they met Mr. Greenberg on the 19th of March, 1910, they were living on fish, with nothing in their supplies but flour and fish (Tr. pp. 125, 189).

The meeting of these men by Mr. Greenberg meant certainly a great financial loss to him. According to the undisputed testimony in the record, he advanced to them the sum of \$2000 for the groceries and supplies, upon which they lived in luxury from March until July. He paid them the sum of \$6000; he furnished them a line of credit at the mercantile store of Robinson, Magids & Co., in 1910, and stood by and saw the appellants draw down the sum of over \$5000 from the profits of the partnership venture. He furnished a line of credit again in 1911 to the Klery Creek Mining Company with the firm of Robinson, Magids & Co., and, after paying \$8000 out of his pocket and witnessing his partners draw down the sum of over \$5000, he is left in the lurch by the appellants to settle with his

mercantile company for over \$20,000 while they stand by and complain that Greenberg has beaten them out of a lot of worthless mining claims, so worthless that the Robinson, Magids Co., or its assignee, Philip Murphy, has not yet even sought to enforce their attachment lien.

Even if this Court should affirm the decree of the lower Court, it is very doubtful whether or not Greenberg will ever secure anything out of the mining property to aid him financially in settling his accounting with his mercantile partners. So far as the mining claims are concerned, the appellants seem to have abandoned them as being of no particular value long, long ago, and are pursuing this appeal in the weird hope that this Court will reverse this case and direct the lower Court to compel Greenberg to pay \$24,000 contrary to all law and every fact in the record. Appellants are not satisfied with taking \$8000 from Greenberg for a lot of worthless mining claims, and involving him in the payment of the whole of the Klery Creek Mining Company's indebtedness, but they are here in an equity Court claiming that they wish to do equity by asking this Court to further order Greenberg to pay into Court the sum of \$24,000, or to permit them to have the first \$24,000 of the gross, which is nearly the same thing in effect.

We have too much confidence in the ultimate justice of cases like the one at bar to believe that this Court could ever be persuaded that there is any equity in the contentions of the appellants on this

appeal. If the trial Court made any errors in the accounting between the partners, they are so slight that we do not believe this Court would be justified in reversing the case for a new accounting, especially in view of the fact that the appellants refused to assist the Court in arriving at these conclusions, but at all times resisted the accounting.

Should, however, this Court take the view that any substantial injustice has been done the appellants in the accounting, and a reversal is necessary, we submit the appellants, being in the wrong, and wholly responsible for the necessity of resort to litigation, should be compelled by order of this Court to pay the costs of suit. This is universally the rule in our Courts.

Harrison v. Clarke, supra.

This Court, on the former appeal in this case, held that it appeared from the record in the case that Greenberg had a good cause of suit for a dissolution of the copartnership and for an accounting, and, as we stated in the beginning of our argument, we believe that the only real question before the trial Court was the accounting between the partners, so we repeat, if any error was committed by the trial Court in making the accounting, the appellants, being in the wrong, should be compelled to pay the costs of suit, and not the appellee.

In conclusion, we submit that the decree of the trial Court is just and fair and is supported by all of the evidence in the transcript.

We submit the rulings of the lower Court and its decree should be affirmed.

Respectfully submitted,

WILLIAM A. GILMORE,
Attorney for Appellee.

NO. 2515

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

O. ITOW and E. FUSHIMI.

Plaintiffs in Error,

vs

THE UNITED STATES

Defendants in Error.

IN ERROR TO THE DISTRICT COURT FOR
ALASKA, DIVISION
NUMBER ONE.

Brief of the Plaintiffs in Error.

J. H. COBB,

Attorney for Plaintiffs in Error.

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Brief of the Plaintiffs in Error.

STATEMENT OF THE CASE.

The Plaintiffs in Error, whom we shall hereafter refer to as the defendants, were jointly indicted in the District Court for Alaska, Division Number One, on the 13th day of December, 1912, for the murder of Frank Dunn, alleged to have been committed on the 14th day of July, 1912. The defendants were

on the same day, and in the absence of their counsel, arraigned. On the next day, their counsel still being absent, the defendants had counsel appointed for them by the Court, and plead "not guilty," and the case was set for trial to follow the case of the United States vs. Dick Manson.

Defendants are Japanese fishermen, unable to speak or understand the English language, except a little "pigeon English" in use among hands around the salmon canneries. They could not communicate with their counsel or testify except through an interpreter. All the witnesses for the defense, with one exception, are in the same situation. And these witnesses at the time of the indictment, arraignment, and pleas were all in Seattle, Washington, or Portland, Oregon. Application for process for these witnesses was made and granted on December 20th, 1912.

On January 2nd, 1913, the case was called for trial. Counsel for defendants thereupon asked for a postponement until Monday (which was January 6) exhibiting a telegram from the United States Marshal at Portland, Oregon, to the Marshal at Juneau under date of December 30th reading, "Two witnesses leave for Juneau tonight. Washout between here and Seattle. If able get through will leave Seattle Tuesday thirty-first on Steamer Northwestern." Defendants strenuously objected to be-

ing compelled to go to trial until their witnesses arrived and their counsel had had an opportunity to talk with them and prepare for trial. The court denied the application to postpone and compelled the defendants to go to trial without a single witness for the defense being present, and before their counsel had had any opportunity whatever to make the slightest preparation for trial. Time to make a written showing was even denied. To all this an exception was reserved. Later in the day a telegram was received notifying the defendants' counsel that the witnesses were all on the Steamer "Dolphin" enroute to Juneau, and based on this information an application was made to the court to postpone the trial to the arrival of the Dolphin, about January the 6th or 7th. This application was refused, and exception reserved. The jury were drawn on January 2nd and 3rd, and the District Attorney made his opening statement. Counsel for defendants declined to make an opening statement on the ground that having been unable to see the witnesses who were still absent he was unable to make a statement. The government completed its evidence in chief the 6th of January. On that date the witnesses for the defense still not having arrived (the Dolphin was delayed by weather) an adjournment was taken until January the 8th; and on that date and for the same reasons, a further adjournment was taken until the 10th.

In the meantime, and at each adjournment of court, the jury were not kept together, but suffered to separate and go about their several vocations in and around the town of Juneau. On January the 7th there was published in one of the daily local papers a purported interview from the District Attorney bearing on the case.

On the reconvening of Court on January 10th the following proceedings were had.

“Mr. Cobb: I desire to present a motion at this time. I think in view of the nature of the motion the jury may be withdrawn. The defendants at this time move that this jury be discharged from further consideration of this case. The grounds of the motion I will state that in view of the insistance of the District Attorney to take up the case at the time it was taken up before the arrival of the witnesses for the defense and the court compelling us to go to trial at that time, counsel for the defendants consented that the jury might not be kept together during the four or five days’ intermission of the trial which was largely rendered inevitable. Notwithstanding that the court counselled all parties connected with the case, cautioned all parties to be careful, that there might be no impropriety in the conduct of any of the parties connected with the action, the district attorney, on last Monday, and knowing that the jury were not under surveillance but loose all over the

town, going about their ordinary avocations, gave out the following interview to the press: "Japanese are accused of many crimes. Federal official tells of cannery conditions. Many crimes committed by alien labor employed in canneries which is not reported to courts. 'It is not at all unlikely that there are more murders committed among the canneries of southeastern Alaska than we have any idea,' said United States District Attorney Rustgard this morning." This is a paper under date of Tuesday, January the 7th, 1913. "Said District Attorney Rustgard. "There is no question but that among the orientals employed in the canneries the fixed idea prevails that any attempt on the part of one of their workers to abandon his employment is an offense which should be punishable with death. Last year, at the Weiss cannery, near Shakan, a Corean threatened to leave the cannery. He was an oriental of unusual intelligence and education and could talk in four languages. He had adopted the ways of civilization, and the constant diet of unsalted rice was more than he could endure. He attempted to escape, but was caught. He was murdered, and eight Japanese took part in the crime. His skull was crushed in with a rock, a pistol bullet was fired through his neck, a stone was tied to his body, and he was thrown into the bay. Had not the sea given up its dead, it is practically certain that the crime would never have been known. But six weeks or two months after-

ward the body floated. The cannery officials claimed, and the claim was doubtless a truthful one, that he had never been missed by them and that they knew nothing about the murder. After an investigation by the prosecuting attorney's office they were morally certain of the conspiracy, and the reason the murder was committed, but there was a failure of conclusive evidence, and so, when one of the Japanese offered to plead guilty to manslaughter, on condition that the other cases would be dismissed, the offer was accepted. Afterwards the full story of the murder was obtained. The eight Japanese had committed the crime, but the one who had confessed had been selected by the lot to plead guilty on condition that the others be freed. When a statement was taken by representatives of the prosecuting attorney's office in the Itow case, of the bookkeeper of the cannery, a Japanese, he was asked if he had not himself shot at Frank Dunn about a week before the tragedy for which Itow and Fushimi are now being tried. He said that he had not. He was then asked if, once when Dunn had claimed to be sick, he had not gone to his room to get him to go to work because the cannery needed his services, he had not ended by shooting at Dunn. 'Oh, oh!' said the bookkeeper, with a gesture of impatience, 'really I had forgotten it.' But he insisted that he had not intended to shoot him, but merely to frighten him. For a long time refugees from canneries coming to Juneau have claimed

not only that they were held as slaves, but that they were virtually shanghaied at San Francisco and Seattle. Although it is true that most of the unfortunates are either orientals or Mexicans, or in a few cases, Spaniards, it is undoubtedly true that there were other American boys, like Frank Dunn, who, finding themselves impoverished in a strange city, have become victims of the system. And as these would find it more difficult than the others to endure the fare, it is probable that many of the victims buried beneath the waters of the sounds and straits of the Inside Passage were born on American soil."

Of course, I having no means of knowing—it is manifestly improper to make any inquiries as to whether that piece was read by the jury or not, but I feel morally certain some, if not all, of them did read it. The court will note that the heading of it is artfully disguised so as not to indicate that in the beginning it relates to this case, and a man picking it up, although he did not intend to read anything about it, would be misled into reading it, the same way that advertisements are gotten up. Not only that, but the article published as it was, makes a kind of atmosphere so sinister to the defendants in this case, whose story has never been heard by the public, that I don't believe that any man could walk the streets of Juneau, as this jury has done, without feeling this intense atmosphere of hostility that has especially

developed since the publication of that infamous article. I desire to say furthermore, in that connection about it, especially about the shooting, I am informed by the Japanese interpreter at thaat time, who is a man of high character, up in the diplomatic strvice of his country, and came over to this country. He was doing the interpreting at the time that statement was made by Itow, and the district attorney had reason to know that his statement would be material in this case and the statement was in this way false. I make this motion following the ruling of the Circuit Court of Appeals of the Ninth Circuit in a civil case in which the misconduct of the counsel was incomparably less than in this case, and that was in a civil case, and the court said that the motion that was made should have been granted. I refer to the case of the Alaska Treadwell Gold Mining Company against Cheney, the 162nd Federal, 593.

Mr. Rustgard. May it please the court, counsel has read a small article, accrediting it to me and evidently wanting it to go on record as a quotation from myself. The article quotes, I think, six or eight lines from me, and what is quoted I admit is a statement which I made. I submit, however, that I did not make the statement for publication. The conditions under which I made it were substantially as follows: One of the representatives of the paper came into my office and started to talk about something entirely different, touching proposed legislation and the

work of the next legislature of Alaska. The conversation drifted over on this particular case, and in that conversation I did make the statement contained in the first six or eight lines in the article in question. The rest of it was partly probably gotten from me; partly from others. It is a matter that has been discussed at various times, and the court will realize that now, when there are two newspapers in this town, they are both given to getting the "scoop" on the other; for that very reason I have invariably admonished the newspaper men who call at my office daily to refrain from publishing anything with reference to any case that is on trial or that is probably for trial during this term, in order that those who may be summoned as jurors should in no way be influenced, I think the court knows that is the position I have taken in every respect. I do say that I regret that that article was published, but I don't believe that it has reached any of the jurors. When counsel and myself consented that the jury might be allowed to go or be at liberty during the trial, it was undoubtedly because both counsel and myself personally know the jurors serving on this panel and personally have sufficient confidence in each and all of them to believe that they would in every particular obey the instructions of this court. I dare say that I have taken pains to watch the behavior of all the jurors during the recess of the case, and I have found that they have walked with exceptional circumspection

in every particular. For that reason I am satisfied, as I am also satisfied that counsel knows and is convinced, that they have not allowed anybody to talk to them or in their presence touching the case or that they have read any article touching the case. On that I am perfectly satisfied and perfectly confident. The court must also realize that in the present stage in this city where there are two newspapers we must expect that the newspapers are going to publish something concerning the case during the trial, and counsel knew that when he consented to having the jury not keep together during the trial and he must have consented to it upon the reliance that though there would be articles published touching the case, yet they would obey the instructions of the court and refrain from reading anything on the subject. Under the circumstances it is evident that if the rule which counsel invokes should be the law, the jury would have to be shut up in every case, because it is impossible at the present time to keep the newspapers from publishing anything concerning a case, although I will say, personally. I have taken the utmost precaution and admonished all of them from making statements pending the trial and prior to the trial. That is all I have to say your Honor.

Mr. Cobb. If the court please, I should not be so much concerned about any thing that emanates from the newspapers as such. I know, as said by some jurist, that most men pay little attention to

that, but here is an article which purports to emanate right from the district attorney's office which evidently did emanate in part from it and which contains matter which could only have come from the district attorneys office involving the secrets of the investigations made concerning this very matter. Not only that counsel is complaining of the newspapers—there is only one of them that has been guilty that I know of, of any improper conduct during this term of court; that paper is absolutely controlled by this court; since shortly after the failure of the Record Miner it has been known as an administration organ; it is now being run by a receiver who is an officer of this court and also the guard at the jail, which is within the knowledge of everybody. Its news editor is a brother-in-law of the marshal of this court. The paper is closely identified with the officers of the government in southeastern Alaska. Now that sort of a statement published in a paper of that sort, purporting upon its face to emanate from the district attorney's office, I may state, prevent it from being possible for these men to secure a legal trial before this jury or any other—before any jury gotten in southeastern Alaska. The complaint the district attorney makes against the papers and probably thinks is true to a certain extent. All the more reason why under the circumstances, after the jury being loose here, why he as an officer of the government should have refrained from giving out any statement to

the newspapers for publication at that time. He states that he didn't give it out for publication. All I know about it is his statement and the statement I have taken from Mr. Russell that the interview was a statement from that officer.

Mr. Rustgard. Mr. Russell never called on me at all.

Mr. Cobb. I said it was an interview taken by Callahan. Let that be as it may the wrong has been done and I know of no way of righting it except to call a halt as we have.

The Court. "Call the jury; let me take the article which you referred to. The jurors will probably remember that after you were empanelled and sworn in this case the Court asked in particular among other things that you refrain from reading newspapers during the trial of this case and if you did read newspapers that at least the parts that referred to this trial should be removed by your friends or family so that nothing should be read that would touch upon this trial. It has been brought to my attention that an article in the paper called the Daily Alaska Dispatch on the 7th of January, Tuesday. I will now ask the jurors if any one of them had occasion to read what appeared on that date an article entitled "Japanese are accused of many crimes" and purported to give a history of general conditions about canneries and incidentally touched upon at least one

phase of the present case that we are trying. If any juror had occasion to read that I would ask that—it may inadvertantly have come into your hands and without knowing it was about this case and you read it; if he did I want you to let me know and you can do that by raising your right hand. I will ask did anybody say anything to you about such an article or in your hearing pertaining to this case or Japanese in Alaska?” (None of the jurors responded.) “The motion is denied. You may proceed gentlemen.”

Mr. Cobb. We reserve an exception.

After the examination of the first witness for the defense, the government asked leave to reopen the case and introduce further testimony in chief. Leave was granted over defendants objections.

The district attorney then offered in evidence a typewritten copy of questions propounded by him to E. Fushimi and the latter's answers thereto taken in the district attorney's office on December 10th, 1912. Fishimi at the time was not under oath.

To this statement defendants counsel objected on behalf of Itow that it was hearsay and incompetent; that if offered as a confession or admission against Fushimi the government should have had separate indictments and trials. On behalf of Fushimi it was objected that the statement was a privi-

leged communication and could not be used without his consent. The objections were overruled, Exceptions taken and allowed, and the statement read to the jury. It is as follows:

“Statement of Eddie Fushimi (through Kinya Okajima, interpreter, December 10, 1912.)

Q. (By U. S. Attorney Rustgard.) I understand that you know something about the killing of Frank Dunn over at Dundas Bay last summer. I want you to tell me all you know about it and all you saw about it.

A. They both quarreled and one of them killed.

Q. Now, what was the quarrel about?

A. Don't know.

Q. When did you first hear about the quarrel?

A. I was there. I was there while they quarreled, but I don't know.

Q. Where was it that Frank was killed?

Interpreter. I can't understand this fellow. He says bridge or slope-pridge, and then pig pen, or pig house he called it—and between the plank or slope he called it—you know in Japanese he says bridge, you see—and between the pig house there is a hilly place—that is the place.

Q. Will you look at this picture and see if that represents the place where Frank was killed?

Interpreter. He says this picture doesn't show it very well; he says killing took place just other side of this plank here, and, really, it is sort of continuation of this plank, he says, but this picture does not show it very well, he says.

Q. Now, do you mean to say that the killing took place to the left of the bridge leading up to the door of the China house, as represented in this picture, and above the double-plank walk along the beach?

A. Yes; and he says he wants to say this, according to the picture these two planks look straight, continuation of this bridge but it is not so, that it is just turned this way and this other one sort of continuation of this.

Q. These double planks at the left of this picture are at an angle, and almost a right angle to the bridge up to the door?

A. This one yes; that is what he says, this one—sort of continuation of this, but this picture don't show this.

Q. Now where were you at the time Frank was killed?

A. Near the entrance to the house.

Q. Well, how far from Frank were you?

A. Well, he says—he says he can't tell how many fight, but Frank was killed down below and he was up there.

Q. Do you mean to say that you were standing at the upper part of the bridge leading up to the door of the China house at the time Frank was killed?

A. Yes.

Q. How long had you been standing there at the time Frank was killed?

A. Just—justa—only a little while; as soon as I saw it I went to the superintendent's house.

Q. Well, where did you come from at the time you came up there?

A. Came from Indian town.

Q. What were you doing at that time?

A. He was was going to the toilet, and then opened door and Frank came out.

Q. Were you standing near that door of the China house at the time Frank came out?

A. Yes.

Q. Did anybody else come out with Frank?

A. Nobody.

Q. Did Frank come out alone?

A. Yes.

Q. Now, when Frank came out what did he do?

A. No; he didn't do anything.

Q. Well, where did Frank go to?

A. He says he went into the house, and then I heard something, and came out again, he says.

Q. Now, you went into the house first, then you heard some noise and you went out again; is that correct?

A. Yes.

Q. Now, how long had you been in the house when you heard the noise and went out again?

A. He says, I can't tell just how long it was, but I went in the house and walked about twenty steps and then entered the toilet and came out, so I don't know how long it was.

Q. Well, did you see Frank when you went out?

Interpreter. Frank went out of the house you mean?

Q. Yes. Did you see Frank when he went out

of the house; that is the question. Did you see Frank when Frank went out?

A. From the house, it is when Frank went out of the house?

Interpreter. He says he does not understand the question. What do you call that house?

Q. China house?

A. Well as soon as he came out the quarreling began.

Q. That is not the question. I want to know whether he saw Frank go out of the China house?

A. Yes, I saw him.

Q. Where were you standing at the time Frank came out of the door of the China house?

A. I was standing near the door.

Q. Inside the doorway or outside the doorway?

A. I don't remember.

Q. After Frank went out, where did he go?

Interpreter. Did Frank?

Q. Where did Frank go after he left the door of the China house?

A. He went to—he went to strike Itow.

Q. Where was Itow?

A. He was—I don't quite understand—he say Itow fell down on the ground.

Q. Itow was down on the ground?

A. Yes.

Q. What did Frank do then?

A. Frank striked him.

Q. What did he strike him with?

A. Hand, with his hand.

Q. Where did he strike Itow?

A. Did't see.

Q. How far from the walk leading up to the China house—this bridge you refer to—was Itow lying when Frank came out and struck him?

A. Well, close to the end of the bridge.

Q. Well, was there anybody near except those two?

Interpreter. He says he doesn't remember; he is just thinking; he hasn't answered at all you know.

A. Well, it may be the Chinaman was there because he was the first one came out of the house, he says.

Q. Well was there anybody standing near Itow and Frank at the time the two were together and at the time Frank struck Itow?

A. I don't think there was anybody.

Q. Now, was there another Japanese near you at that time?

Interpreter. What time do you refer to?

Q. The time Frank struck Itow?

A. No, no.

Q. Did you see Mr. Ohto there at that time?

A. No.

Q. Did you see him in the China house?

A. No.

Q. Was he standing near you?

A. No.

Q. Now, do you know the reason Frank went out of the China house?

A. Why, I think he went to strike Itow, I suppose.

Q. How is that?

A. He says, went for the purpose to strike Itow, I think.

Q. Now, after Frank struck Itow, what did Itow do?

A. Didn't do anything.

Q. Didn't do anything—did he lay still?

A. Yes; at the time he was still there.

Q. Did he get up after he was struck?

A. Yes.

Q. After he got up what did he do?

Interpreter. You refer to Itow when you say "he?"

A. Yes.

A. He got up and walked toward the China house.

Q. Itow walked towards the China house.—what did he do there?

Interpreter. In the China house, you mean?

Mr. Rustgard. Yes.

A. He was disputing in words with Frank and saying why Frank struck him, etc.

Q. He and Frank were arguing the case?

A. Yes.

Q. Well, what happened then?

A. Frank struck Itow again.

Q. What did he strike him with?

A. He says with his hand.

Q. Where did he strike Itow?

A. I don't—I can't tell you.

Q. Where were you standing at that time?

A. Near the door.

Q. You were not standing at the same place?

A. Well, not exactly the same spot, but near the door.

Q. Well, after Frank struck Itow that time what did Itow do?

A. He struck Itow; Itow struck Frank with the case of the sword, that is with the sword in the case you know—what you call that, I forget that word.

Mr. Rustgard. Scabbard.

A. Scabbard—case, you call scabbard, and they had it in a big, you know what they call it* clothes bag.

Q. Outside the sword?

A. You know with the clothes on he struck.

Q. Where did he strike Frank with that sword in the scabbord?

A. I can't tell just where he struck.

Q. Do you know where he hit Itow—I mean where did Itow hit Frank with the sword and the scabbard?

Interpreter. I don't quite understand what he means in Japanese, so I am asking him what he means.

Mr. Rustgard. Go ahead; just go after him and get the answer to my question.

A. He says he doesn't know where he struck.

Q. Well, couldn't you say where Itow hit at that time?

A. I didn't see where he struck.

Q. Well, how far away from you was he at that time?

A. Why, close, I was right close.

Q. How many feet away were you?

A. Possibly two feet.

Q. About two feet away?

A. Yes.

Q. What did Frank do then, after Itow struck him with the sword in the scabbard?

A. He held the scabbard—he held the scabbard with his left hand, I remember he says.

Q. Yes, now, then, what did he do with his right hand?

A. Struck the other fellow.

Q. Where did he strike him?

A. I can't tell just where.

Q. Is this the sword lying here?

A. Yes.

Q. Now, what did Frank do then?

A. Frank, he—hit Itow with his right hand, holding the scabbard with his left hand, and Itow struck him too—Itow struck Frank too.

Q. What did—

A. No; I don't—excuse me, he understood what I said. He did not mean that—oh, he meant, Frank hit Itow, holding the scabbard with his left hand, that is all he said—I misunderstood him.

Q. Tehn Frank took hold of the scabbard with his left hand?

A. Yes.

Q. And then Itow did what?

A. He says he fell down right—Itow fell down right—somewhere near the bridge.

Q. Did Itow fall down?

A. Yes.

Q. After he had struck Frank with his sword that is what you mean ?

A. Yes—I see, while Frank hit Itow and then Itow fell down.

Q. Itow fall down?

A. Yes.

Q. That is the second time, when Frank hit him—Itow, is it?

A. Yes.

Q. Well, then what did Itow do after he had been knocked down?

Interpreter. You want to know after Itow fell down what Itow did?

Mr. Rustgard. Yes sir. Well, let us have it. Go ahead and tell it.

A. After a little while he got up.

Q. What did he do after he got up?

A. He—when he got up, he says, well—hollered that he hurt Frank.

Q. Itow said he hurt Frank?

A. Itow said he hurt Frank.

Q. Did Frank say anything about having been hurt?

A. Just a groan.

Q. Groan?

A. Yes.

Q. Where did Frank go?

A. Frank walked staggering toward the road leading to Ondian town.

Q. How far did he walk?

A. Six or seven big steps.

Q. Well, what did he do then?

A. Frank, you mean?

Q. Yes.

A. He fell down and I went to see the superintendent; I don't know anything more.

Q. Well, did you look at Frank when he fell down?

A. I saw him fall, but I did not go close to him.

Q. Did you see how he fell, whether on his face or on his back?

A. No; I didn't notice it.

Q. What did Itow do then, after he got up and said he had hurt Frank?

A. He says, when he started towards the superintendent's house Itow was there in the same place.

Q. Now, who was the superintendent—what is his name?

A. I don't know his first name; his name is Mr. Nelson.

Q. That the gentleman sitting there behind him (indicating)?

A. Yes.

Q. Now, did you and Itow go down to Nelson's house together?

A. That was afterwards, but first I went myself.

Q. Well, what did you go down to the superintendent's house for?

A. To tell him about the trouble.

Q. Now, when you came back from the superintendent's house, did you see Itow up near the China house?

A. Now, when I left the superintendent's house, was going back to the place I was before, I met Itow on the way and he could hardly walk, so I helped him to walk to the superintendent's house.

Q. What was the matter with Itow at that time—why couldn't he walk?

A. I don't know why.

Q. Well, had he been hurt?

A. Well, he was struck you know.

Q. Oh, he was struck—was hurt by Frank so that he could hardly walk; is that it?

A. Well, I can't tell you about that; as to that, I don't know about it.

Q. Well, did he at the time complain to you that he had been hurt?

A. Yes.

Q. Where did he say that he had been hurt?

A. He simply said that he hurt me bad.

Q. Didn't Itow tell you where he was hurt—what part of the body he was hurt?

A. No.

Q. Did you ask him what part of the body troubled him?

A. No.

Q. Where did you take Itow to?

A. To superintendent's house.

Q. Well, at the time Itow and Frank had the fight outside did you see Ohta there?

A. No.

Q. Now, was there any other Japanese near except yourself and Itow?

A. Yes; there was Japanese, but I don't know where he came or where he come from.

Q. Who was the other fellow?

A. W. Nakayama.

Q. Now, what was he doing there?

A. He wasn't doing anything.

Q. Where was he standing at the time these two men had the fight?

A. I don't know just where he was standing.

Q. Where did you see him standing?

Interpreter. You mean to say where this man was standing?

Q. Where did you see Nakayama standing?

A. Nakayama was on the bridge, he says.

Q. How far from you?

A. I don't know how far, of course.

Q. Well, can't you state approximately?

A. Not—just a little way, just a little way.

Q. Now, was Nakayama there at the time the fight commenced?

A. No; he wasn't there when it started.

Q. How long after the fight started did he come?

A. Just a little while after that; I don't know how soon after that; possibly the fight started he heard it, and he came out, I guess.

Q. How far from Itow were you at the time he struck Frank with his sword?

A. About two feet away.

Q. How far was Nakayama away from Itow at that time?

A. I can't say where he was at that time—Na-

kayama you are referring to—Nakayama, you know, I don't remember.

Q. Can't you say how far away from you he was at that time?

Interpreter. You refer to Nakayama?

Mr. Rustgard. Yes.

A. I should judge—I should judge six or seven feet.

Q. Now, where was he standing at that time when he was as much as six or seven feet away from you?

A. On the bridge; standing on the bridge.

Q. Were you standing on the bridge, too?

A. No; I was close to the door.

Q. Well, where was Frank and Itow at the time Itow struck Frank with the sword the last time?

Interpreter. Itow struck Frank with the sword you mean?

Mr. Rustgard. Yes.

A. Frank was right close to me near the door, and then Itow first fell down you know; he came up near the house, near to the entrance to the house.

Q. Well, after Itow was knocked down did he

go back up to the house where Frank was?

A. Yes.

Q. Well, were they standing on the bridge in front of the doorway at the time they had the last fight?

Interpreter. You mean two, the boys?

Q. Itow and Frank standing on the bridge leading up to the doorway in the China house the time they had the last fight?

A. Yes.

Q. How far from the door?

A. They were right close to the door, and possibly in the fight may be inside the door.

Q. I see, right in the doorway?

A. Yes.

Q. After Itow had struck Frank the last time did Frank walk from the doorway of the China house toward Indian town?

Interpreter. From the doorway you say?

Mr. Rustgard. Yes.

A. No. They fell down first and then walked toward the Indian town.

Q. Frank fell down first, after Itow had hit him, and then got up and walked; is that correct?

A. Yes.

Q. How far away from the bridge leading up to the China house was Frank at the time he fell down after he was stabbed.

Interpreter. How far from the—

Q. How far from the bridge leading up to the doorway of the China house was Frank when he fell down after he was stabbed?

Interpreter. How far away from the bridge, you want to know—the last time you refer to, you want to know?

Q. Yes.

A. Seven or eight steps.

Q. Now, I understand you to say that when Frank struck Itow the first time Itow was lying on the ground near the bridge leading to the China house; is that correct.

Interpreter. When Frank struck Itow the first time?

Q. First time.

A. Yes.

Q. Then Frank came back to the China house did he?

A. Yes.

Q. And Itow followed him up to the doorway?

A. Yes.

Q. And then Frank knocked Itow down near the doorway?

A. Yes—no; he did not knock him down but struck Itow.

Q. Struck Itow?

A. Yes.

Q. And Itow fell down?

A. No.

Q. Did Frank ever knock Itow down that time?

A. No.

Q. Now, where did Frank strike Itow that last time?

A. I don't know just where.

Q. Now, was Frank standing in the doorway of the China house at the time Itow stabbed him, stabbed Frank?

A. He—he wasn't.

Q. Well, how far from the doorway was Frank standing at the time?

Interpreter. You refer to stabbing?

Mr. Rustgard. Yes.

A. Near the—can't tell just where, but anyhow near the lower end of the bridge referred.

Q. Was Itow standing up or lying down at the time he stabbed Frank?

A. Well, he was sitting on the ground on—squatting, he means.

Q. Itow was sitting on the ground?

A. Sitting on the ground; yes.

Q. And where was Frank standing—standing up or lying down?

A. He was lying down.

Q. Frank was lying down?

A. Yes, he was lying down.

Q. Well, what was he lying down for?

A. Well, I think Itow fell down and then Frank also fell down too; first you know Frank was hitting Itow, you know, he says.

Q. Well, do you know any reason why Frank should fall down at that time?

A. Possibly he—he sight slip over something; that is what he says, slipped over something and fell down.

Q. Now, was Frank lying on his back or on his stomach at the time?

A. He was lying down on his stomach.

Q. Now, how far away were you at that time?

A. I was upper end of bridge then.

Q. You saw Itow stab Frank at that time?

A. No, I didn't see it.

Q. How did you find out that he stabbed him?

A. Why, he—Itow—hollered that he hurt Frank, you see.

Q. He called out that he hurt Frank?

A. Yes.

Q. Did Frank get up again and walk awhile?

A. He just walked seven or eight steps and fell down.

Q. Didn't Itow say at that time that he had killed Frank?

A. No; he did not say so.

Q. What did Itow do with the sword he had?

A. When I saw him he had it in his hand.

Q. What did he do with it at last?

A. Well, I didn't see what he did with it at last, but I heard afterward he gave it to the superintendent.

Q. Were you there at the time Itow shot one of the Mexicans?

A. Well, I was quite away, I was—going home, he says; I don't know, going home from the superintendent's, you see; I didn't see.

Q. How far away from Itow were you when he shot?

A. I don't know for sure, but forty or fifty steps, I should say.

Q. What did he shoot for? Do you know?

A. No.

Q. Do you know about any quarrel between Frank and Itow before this?

A. Not that I know of.

Q. Haven't heard of any disagreement between them?

A. —

Mr. Rustgard. Ask the question.

A. No; I didn't hear anything about it.

Q. You are sure of that?

A. No; I never heard they quarrel or fight.

Q. Did you hear about any quarrel between the two or any disagreement between them about anything?

A. They—he says; I don't understand that—he doesn't refer to fight, but he says they had an argument I hear, he says.

Q. Where was that?

A. In the Japanese house.

Q. When was that?

A. A long time before that thing took place.

Q. How long?

A. Oh, week or ten days before that time.

Q. Now, what was that argument or disagreement about?

A. I don't know what about, I went in there and saw that is all.

Q. Well, now, I want you to tell me what that disagreement was about; you know all about that?

A. What I heard was that Frank wanted to go away from the camp; that is what I heard.

Q. Now, did Itow expect Frank to go away that night he was killed—that night Frank was killed?

A. I don't know.

Q. Had you any talk with Itow about Frank that evening before the killing?

Interpreter. This man?

A. No; he did not say anything.

Q. Had you been looking for Frank that evening?

A. Yes.

Interpreter. Looking for Frank?

Mr. Rustgard. Yes.

Interpreter. Maybe I did not understand that?

Q. Had you been try to find Frank?

Interpreter. Oh, I see.

A. Yes. That is—he means—

Interpreter. I put it this way, the question—you know you say look for.

Mr. Rustgard. Yes.

Interpreter. I said in Japanese, if he hunt for him, that is all right?

A. He said "yes."

Q. Where did you go and hunt for him?

A. Went to the carpenter's place.

Q. Oh, yes. What time were you there trying to find him?

A. I don't know; it was night time, but I don't know.

Q. How long before this fight?

Interpreter. Oh, excuse me; he said afternoon; I misunderstood—not night time—I misunderstood him.

Q. What time in the afternoon?

A. I don't know what time it was, but it was toward evening, he says.

Q. Toward evening. Now, what did you want to see Frank about at that time?

A. Frank was a friend of mine, so I just looked for him. I used to drink together with him.

Q. Did you find Frank at that time?

A. No.

Q. Did you ask anybody where Frank could be found?

A. Cook—and I asked the cook and carpenter, he says.

Q. Are they here, any of them.

A. Yes (indicating).

Q. What did you say to that man?

A. I don't remember what I said to him.

Q. Didn't you tell him at that time that you wanted Frank to come and take a drink with you?

A. No, I didn't say that.

Q. Was Itow with you at that time?

A. No.

Q. Where is Nakayama now?

A. I don't know where he went from the cannery—he means when the cannery finishes.

Q. Now, this time Frank was killed, was Itow with you at the time you went to the Chinese bunkhouse—on the occasion upon which Frank was killed, did Itow go with you at the time you went to the Chinese bunkhouse?

A. No.

Q. Where was Itow standing at the time you went in?

Interpreter. To the bunkhouse, you mean?

Mr. Rustgard. Yes.

Interpreter. Chinese bunk—

A. I don't know.

Q. Did you ask for Frank when you came in that time?

A. No.

Q. Was the door locked at the time you came to go in?

A. Yes.

Q. How did you get in, then?

A. Frank opened the door.

Q. Did you knock on the door?

A. Yes.

Q. And Frank opened the door?

A. Yes.

Q. Did Frank say anything to you at that time?

A. He might say something, but I don't remember what he said.

Q. Did you say anything to Frank at that time?

A. I don't remember now.

Q. What did you go in there for at that time?

A. For the purpose to go to the toilet.

Q. Is the toilet in the bunkhouse?

A. Yes.

Q. Haven't you got a toilet over at the Japanese bunkhouse?

A. No.

Q. What time of night was this?

A. About eleven or twelve.

Q. Was it pretty dark at that time?

A. It was dark, but not very dark, he says.

Q. Do you remember whether it was raining or clear weather?

A. I don't remember; I did not pay any attention to the weather, I don't know.

Q. (By Ass't U. S. Attorney Folsom). Was there a light in the bunkhouse; was there any light in the Chinese bunkhouse at the time?

A. I don't remember.

Mr. Rustgard. Ask that to be marked as an exhibit.

The trial resulted in a verdict and sentence against Itow of murder in the first degree, and he was sentenced to hang. Fushimi was convicted of manslaughter and sentenced to twenty years in the penitentiary.

The case was first taken to the Supreme Court on writ of error, but was dismissed for want of jurisdiction. Within the time allowed by the Alaska Code (Com. Laws of Alaska, sections 1337—1338) a writ of error was sued out from this court.

The errors relied upon for a reversal are:

1st. Gross abuse of discretion of the trial court in forcing the defendants to trial before their counsel had any opportunity to prepare the defense, and which prevented a fair trial.

2nd. Unfair and illegal conduct on the part of the District Attorney calculated to prejudice the jury against the defendants, and the refusal of the court to discharge the jury and order a mistrial on defendant's motion after the discovery of such conduct.

3rd. Error of the court in permitting the jury after they were selected, impaneled and sworn, to separate and mingle with the community at large at each adjournment prior to the time they were charged.

4th. Error of the court in admitting in evidence the statement of E. Fushimi taken December 10th, 1912.

5th. Refusal of the court to give instructions requested.

These points are raised by the first four and the seventh assignments of error.

First. The court erred in refusing the application of the defendants to postpone the trial of this case until January 15th, 1913, and until the arrival in Juneau, Alaska, of the witnesses for the defense, and a reasonable time and opportunity for defendants' counsel to see said witnesses and make reasonable preparation for trial; and in compelling defendants to go to trial on January 2nd, 1913, before the arrival of said witnesses, and thereby in effect denying to defendants the right to have their counsel make an opening statement to the jury; and in denying the motion for a new trial, based upon this ground.

Second. The court erred in not discharging the trial jury and entering a mistrial, upon the request and motion of the defendants, for the reasons stated in said motion, viz: That the jury having been selected, impanelled, and sworn, were allowed to separate on each adjournment, or recess of court, and go at liberty about the town of Juneau; that on

January the 7th, while the jury were so separated and at liberty, the district attorney gave out an interview to a newspaper reporter, which was published in Juneau on said date, an article entitled, "Japanese Are Accused of Many Crimes," and in refusing to grant a new trial on this ground assigned in said motion, a copy of said article being attached to such motion.

Third. The court erred in permitting the jury, after they were selected, impaneled, and sworn, to separate and go about their several vocations at each adjournment or recess of the court until the case was finally given to the jury.

Fourth. The court erred in over-ruling the objections of the defendants to the purported confession or admission of the defendant, Fushimi, made before the district attorney, and permitting the same to be read in evidence to the jury.

Seventh. The court erred in refusing the following instructions to the jury requested by the defendants, to-wit:

"You are instructed that the killing of a human being is justifiable when committed to prevent the commission of a felony upon the person of the slayer or upon his servant or in the lawful attempt to suppress a riot or preserve the peace. So in this case if you find and

believe from the evidence that the deceased, Frank Dunn, was attempting to commit a felony upon the persons of Nakayama and Fushimi, and that Itow was the foreman in charge of said Nakayama and Fushimi, and that in the attempt on the part of Itow to prevent the commission of such felony, the deceased was killed, or if you have a reasonable doubt as to whether the deceased did not lose his life in that way then you must acquit.

“It would also be your duty to acquit if you believe that at the time Itow reached the scene of the fatality there was riot in progress or a breach of the peace was taking place and Itow was making a lawful attempt to suppress such a riot or preserve the peace or if you have a reasonable doubt as to whether the killing did not so occur in either case the defendants are not guilty.”

ARGUMENT.

First. We are fully aware of the rule that matters within the discretion of the trial court seldom furnish ground upon which to predicate reversible error in a Federal Court. And matters relating to postponments, etc., are usually discretionary. But no Federal Appellate Court, so far as we are advised, has ever said that *gross abuse* of discretion in the lower court would not warrant a reversal. In

nearly all the cases we have read, over-ruling assignments based on such matters, it is said that to warrant a reversal there must be gross abuse of discretion.

The question here presented we believe may be fairly stated thus: Did the action of the Court, complained of, deny the defendants a fair and impartial trial, such as is guaranteed by the Constitution and is inherent in the very nature and spirit of our laws.

Among some of the rights which every defendant is supposed to have as a matter of course, is the right to be represented by counsel, and to have an opening statement of his defense made to the jury. The exercise of those rights presuppose that a reasonable opportunity has been given counsel to prepare himself to undertake the defense, by ascertaining what the testimony of the witnesses will be, reconciling apparent conflicts, and especially to be able to adequately cross-examine the witnesses for the prosecution so that facts which explain or weaken their testimony in chief may be brought out.

We apprehend that if a trial court arbitrarily denied a defendant the right to counsel, or the right to make an opening statement to the jury, this court would set aside a conviction so obtained. Yet there is no doubt but that that is what the court in effect did in this case.

In this connection it must be borne in mind that

the defendants are Japanese fishermen, unable to understand, or make themselves understood, in the English language. Every particle of information concerning the matters with which they stand charged, had to be obtained by their counsel through the slow, laborious and uncertain medium of an interpreter. Most of the testimony for the government was given in English or Spanish, which they could not understand, and of any inaccuracies or omissions therein as given from the stand they would be unable to advise their counsel during the progress of the trial.

Under such conditions common fairness to the accused, the most ordinary desire to see that a possibly innocent defendant should not be convicted, should, we think, have induced the district attorney and especially the court, to have given ample opportunity for the preparation on the part of counsel for the accused, which every case requires.

What were the facts? Defendants were indicted on December 14th, 1912, and arraigned the same day. On the next day in the absence of their counsel, they had counsel assigned to them, and were required to plead. At the time all their witnesses were in Seattle and Portland. Five days later, as soon as the whereabouts could be ascertained process was gotten out for them. Under these conditions defendants made no unreasonable request. They asked no

long postponement—only till January 15th, so that their witnesses could arrive and the obviously necessary preparation for so important a trial be made. This modest and extremely reasonable request was denied. Defendants were put upon trial on January 2nd before a single one of their witnesses had arrived in Juneau. There was no certainty that they would arrive at all. Under these conditions defendant's counsel had no alternative but to decline to make an opening statement. Defendants were as effectively deprived of this valuable right, as if the court had peremptorily denied it them. Manifestly the right to make an opening statement carries with it the right to an opportunity to be informed of the facts by the witnesses by whom the facts are to be proved so, as to render the right of some value.

To hold otherwise is to sacrifice substance to shadow, to "Keep the promise to the ear and break it to the hope." The right to be heard by counsel, to make an opening address to the jury, to cross-examine witnesses, necessarily involves the right to an opportunity for such preparation as will make these rights of some value.

If an American citizen were arrested in Japan charged with a grave crime, and put upon trial without any opportunity to prepare his defense, and convicted before a tribunal composed entirely of Japanese, we venture to say our government would vigorously protest.

Second. On January 6th the government closed its case in chief. None of the defendants' witnesses had at that time reached Juneau, and the trial could not proceed except *ex parte*. So an adjournment was taken until the tenth. During those four days the jury were at large in the town. On the 7th there was published in a daily local paper the purported interview with the district attorney. We say purported, because the district attorney while acknowledging that he was correctly quoted by the reporter said he did not intend for it to be published. Upon the opening of court on the 10th defendants' counsel called the court's attention to this publication and that the jury were at large, and moved their discharge and that a mistrial be entered. The court called the jury into the box and without swearing them or requiring an answer, asked that if any one of them had read the article in question to hold up his hand. There was no response and the motion was immediately denied and the trial ordered to proceed.

What more could counsel for defendants do? It was manifest that if at least some of the jury had not read this article a miracle had happened. Manifestly counsel could not go to each of the jury and ask them if they had read it. All he could do was to show that they had been exposed to this poisonous outside influence under circumstances that rendered it at least extremely probable that it reached them,

and ask that they be discharged. The court then of its own motion asked the jury en masse that if any one had read it to hold up his hand, and no response was made—as against the almost certain inference under the circumstance that some at least of the jury had read it, we have the mere silence, when invited, not required to speak. And it may be said that it is doubtful if all the jury apprehended fully what was going on, or the purport of the question put by the judge, in the few seconds given the transaction.

‘It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Hence the separation of the jury in such a way to expose them to tampering may be reason for a new trial, variously held as absolute; or *prima facie*, and subject to be rebutted by the prosecution; or, contingent on proof indicating that tampering really took place.’

Mattox vs. U. S. 146 U. S. at page 149.

The Supreme Court does not indicate which of the three rules laid down, it approves. If the right is absolute, the jury should have been discharged; if subject to rebuttal, the government did not rebut it; if contingent upon proof indicating that tampering

really took place, the defendants furnished all the proof the nature of the case made reasonably possible.

This much, however, can be said: The verdict in this case must always rest under the greatest suspicion that it was, in part, at least, due to publication of the district attorney's interview. Should a human being be put to death on such a verdict? Is it to be "tolerated"?

Third. The right to a trial by jury in criminal cases, is guaranteed by the Sixth Amendment to the Constitution. The jury here referred to has been held to be the jury as known at the Common Law. And any statute which abridges this right is void.

Rasmussen vs. U. S., 197 U. S. 156.

That case struck down a provision in the Alaska Code (copied from Oregon) providing for a jury of six in misdemeanor cases.

And in *Thompson vs. Utah*, 170 U. S. 343, it is said:

"The word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument."

In other words it was the rule of the common law, unmodified by any statute.

What was the trial "by jury" at the common law?

"In all the trials for felony, it was necessary, at common law, to keep the jury together in charge of an officer, and not to permit them to separate from the time of their being impaneled and sworn."

12 *Cyc.*, 671, citing Chit. Cr. Law 628.

But it may be argued, defendants' counsel agreed to it. True he did. He could not afford to run the risk of offending some of the jury by not agreeing. But if it was necessary to a constitutional "trial by jury" that the jury be kept together, then neither the defendant nor his counsel could consent.

12 *Cyc.* 672.

In view, however, of the advantage that was sought to be taken of the fact of the jury being at large, the government ought not now to be heard to say that defendant agreed. Certainly neither he nor his counsel would ever have made such an agreement if it had been suspected that the district attorney was going to print in the daily paper his interview concerning the matters on trial.

Fourth. After the government closed its case in chief, and after the defendants had examined one

witness, the government sought and obtained leave to re-open the case; and offered in evidence the unsworn statement of Fushimi made before the district attorney on December 10th, 1912, and taken down by a stenographer. The statement, the objections thereto and the court's ruling and the exceptions are already set out.

The district attorney and the court seem in this matter to have proceeded upon the theory that a conspiracy had been proven, and that the declarations of one conspirator are admissible against all. But if any conspiracy ever existed it had terminated July 14th, 1912, the date of the alleged murder. The rule then had no application, and the evidence should have been excluded.

Wharton Cr. Ev. 9th Ed. Sec 699.

“Nothing is better established than that statements made by an accomplice or co-conspirator after the completion of the offense, and which are simply narratives of the events concerning the accomplished crime, are not admissible against the defendant on trial unless made in his presence.”

People vs. Dresser, 17 Cal. Ap. 28

S. C., 117 Pac 68.

Fifth. The bill of exceptions shows that the in-

structions set out in the assignment were seasonably requested, refused, and exception taken.

Carter's Alaska Code, Sec. 12, provides:

“That the killing of a human being is also justifiable when committed by any person as follows:

First. To prevent the commission of a felony upon such person or upon his ——— servant.

Third. ——— in the lawful attempt to suppress a riot or preserve the peace.

The deceased was a member of a band of Mexicans hired by the Japanese contractor, and was under the supervision and direction of Itow.

The defendants claimed that Itow sent Fushimi and Nakayama to lock the door of the bunkhouse; that when they reached the door they were attacked by the deceased and the Mexicans; that Itow, hearing the noise of the fight, seized a sword and pistol, and hastened to the scene of the trouble, intending and expecting to overawe the fighting men and restore order; that when Itow reached the scene, he was set upon by the deceased, who seized the sword which was still sheathed, knocked Itow down the inclined way leading to the door of the bunkhouse, and as he fell deceased drew the scabbard from off the blade, and in

his drunken condition himself fell down the incline upon Itow, impaling himself upon the sword, the hilt of which was broken against the rocky ground by the impact of the deceased upon the sword. In view of this testimony the charge requested should have been given.

It has been necessary to prepare this brief from the original record and it has therefore been impossible to cite the pages of the transcript. In capital cases taken to the Supreme Court, prior to the enactment of the judicial code, the practice was for the transcript to be printed at the expense of the government. In the majority of cases, the defendant has not the means to have it done, (as in this case) and the result is greatly increased labor for both the counsel and the Court.

In conclusion we ask that the judgment of the lower court be reversed, and a new trial awarded.

Respectfully submitted,

J. H. COBB,

Attorney for Defendants.

No. 2515.

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

O. ITOW and E. FUSHIMI,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

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JNO. W. PRESTON,

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Filed this.....day of February, A. D. 1915.

F. D. MONCKTON, Clerk.

By....., Deputy Clerk.

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F. D. Monckton,

Clerk

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vs.	
THE UNITED STATES OF AMERICA,	
<i>Defendant in Error.</i>	}

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Plaintiffs in error were indicted on December 13, 1912, for murdering one Frank Dunn. Itow was convicted of murder in the first degree and sentenced to death. Fushimi was convicted of manslaughter and sentenced to 20 years' imprisonment in the United States penitentiary at McNeil's Island.

Itow was the Japanese foreman of a gang of Japanese, Mexican and Porto Rican laborers employed under contract in a cannery at Dundas Bay, Alaska. Among the employees in this gang was one American, the deceased. The men under Itow were employed for the cannery by a Japanese contractor

and put in Itow's charge. They were obtained in the United States, transported from Seattle to Alaska, paid about \$140 for the season at the close of their term of employment, and in the meantime money and goods were advanced to them. If any of them left their employment before the end of the season, Itow was obliged to make good the advances thus made to the deserting employee. Dunn, the deceased, had received \$30 advance money and some stuff in addition.

There were also a number of Chinamen employed at the cannery, under the charge of a Chinese foreman. These Chinamen, together with the Mexicans and Frank Dunn, ate and slept in a building known as the "China House". The Japanese occupied a separate building. Dunn roomed with seven other laborers, Mexican and Porto Rican. The above facts are undisputed.

On July 14, 1912, between 10 and 12 o'clock at night, Frank Dunn was killed in front of the "China House" by a sword in the hands of Itow.

According to the Government's witnesses, Itow and Fushimi (the latter one of the Japanese laborers) had been looking for Dunn for several hours, Fushimi stating that Dunn was trying to get away from them, and that if they caught him they would kill him. Admittedly Itow had been drinking freely, and was somewhat drunk at the time of the killing. One of the Government's witnesses had met him in the "Indian Town" near the cannery, and Itow had taken a revolver from his pocket and pointed it at the

witness. He was then induced to go home by Fushimi, who realized his condition.

Shortly after returning from the "Indian Town", Itow and Fushimi went to the "China House", knocked on the door, demanded admission, and asked for Frank Dunn. They were admitted by Dunn, who asked what they wanted. A brief discussion then took place between Itow and Dunn in regard to the latter quitting his employment. The two defendants (according to several witnesses, assisted by a third Japanese), took hold of Dunn and pushed him out of the door. Here the accounts vary. According to the American witnesses outside the "China House", the Japanese rushed Dunn down the inclined gangway which led to the entrance of the house, turned with him to the left, and got him partly down. With Fushimi and the other Japanese holding him down Itow thrust the sword into him. According to the Mexicans who saw the fracas from within the doorway the Japanese pushed Dunn off the runway; Dunn fell to the ground on the side, and Itow then jumped on top of him and ran the sword into him. The witnesses agree that Dunn was at least part way down when Itow stabbed him with a downward thrust of the sword. Dunn died almost immediately. He had apparently said or done nothing to incite the attack and had been able to make no effective resistance.

The Mexican foreman came to the door and asked Itow why he had killed Dunn. Itow, who was then standing on the runway, flourished the sword and his

revolver and defying and threatening those within, replied, "I killed him, and if you don't be careful I will kill you, too", or words to that effect. About that time the Mexicans inside the doorway began to throw cordwood and other missiles at Itow. The latter fired his revolver in the direction of the Mexican foreman. The bullet struck and wounded another Mexican, the witness Castillo.

The witness Nelson, superintendent of the cannery, had come up in the meantime, and was shouting to Itow and telling him to come away. Itow paid no attention at first, but after firing the shot above mentioned walked over to Nelson, dropped his sword and pistol in front of him and gave himself up to his custody. The superintendent had been notified of the killing by Fushimi.

The testimony for the defendants, on the other hand, tended to prove that Itow and Fushimi had been making inquiries after Dunn during the day in order to find him and persuade him not to go away, as they suspected he meant to do; that after their return from "Indian Town" Fushimi, at Itow's request, went with Nakayama (another Japanese) to the "China House" to lock the door and thus prevent Dunn from escaping; that Dunn objected to this procedure, assaulted Fushimi and Nakayama with his fists, and knocked them off the incline; that Itow, hearing the commotion, took his sword and went to the "China House" to protect his men and stop the fight; that Dunn was about to strike him, so that he attempted to strike Dunn with the sword

in its scabbard; that Dunn seized the scabbard, struck Itow with his other hand, knocked him down from this inclined runway to the ground and leaped or fell on top of him; that in so doing the scabbard came off the sword, of which Itow retained possession, and that Dunn fell upon the point of the sword and was thereby mortally wounded.

Dunn, it was asserted, was under the influence of liquor at the time. Itow testified that he was unaware that Dunn had been killed until the next morning at breakfast. Itow claimed to be badly shaken and dizzy from the fall.

Notwithstanding the fact that he had been looking for Dunn for several hours with a view to "persuading" Dunn to remain at the cannery, yet when he finally found Dunn he concluded not to indulge in moral suasion for fear that would hurt Dunn's feelings, but determined to lock the door of the house.

Such is in substance the conflict of evidence which the jury resolved against the defendants.

The first assignment of error relates to the court's refusal to grant a continuance. The indictment had been found December 13, 1912. July 18, 1912, Itow was bound over by the commissioner at Juneau to await the action of the grand jury. December 20 the defendants made application for process to compel the attendance of their principal witnesses, Nakayama, Tanamichi and Oogong, at Government expense, alleging that these witnesses were in Seattle, Washington, and Portland, Oregon. The case came on for trial on January 2, 1913. Counsel for the

defendants then requested a continuance on the ground that the witnesses had started from Seattle, but had not yet arrived; the court, however, ruled that the jury should be impanelled pending their arrival. Later that same day counsel stated that the witnesses had missed their steamer but would probably be along on the next steamer. The court again refused the application for a continuance. The matter came up again the next day after the impanelling of the jury, when counsel for the defense refused to make an opening statement because he had not yet talked to the absent witnesses, and asked to reserve the privilege until he had seen them. The court did not rule on this request, and it was never renewed. Subsequently two continuances, amounting to four days in all, were granted pending the arrival of those witnesses. The trial went on after their arrival. Defendants assign as error the court's original refusal to postpone the trial until January 15 on the ground that counsel was thereby denied a reasonable opportunity to see the witnesses and prepare for trial, and that the court thereby in effect denied "to defendants the right to have their counsel make an opening statement to the jury".

The third assignment of error goes to the court's permitting the jury to separate at each recess of court until the conclusion of the evidence. This was done with the express consent of counsel for both sides. The court was scrupulously careful to instruct the jury in great detail at each adjournment to avoid discussing the case with any one or listening to any dis-

cussion about it, and directed them to inform the court of any wilful attempt to influence them by argument or otherwise.

The second assignment of error was founded on the court's refusal to discharge the jury and enter a mistrial on defendant's motion because of an article published in a paper in the town of Juneau, where the trial was had, during the trial and while the jury was at large. The article in question quoted a brief statement by the United States attorney in regard to offenses of violence among the orientals employed in the canneries, and then proceeded to comment on the murder of Dunn, and on a similar offense in another cannery. The United States attorney admitted having talked to the newspaper reporter about the case, but asserted that he did so with no intention or purpose of having his remarks published and, indeed, that he had frequently instructed this very reporter and other representatives of the press not to publish any statements concerning cases on trial or to be tried. His affidavit to this effect is supported by an affidavit of the reporter who published the offending article. The court, upon a motion to discharge the jury on this account, called the jury in and, reminding them of his previous request to them to refrain from reading newspapers during the trial unless expurgated of anything relating thereto, asked whether any of them had read the article referred to, which the court described as "an article that was entitled 'Japanese accused of many crimes' and purported to give a history of general conditions about canneries and

incidentally touched upon at least one phase of the present case that we are trying". The court then directed that if any juror had read the article he should let the court know by raising his right hand; and then put the question directly. None of the jurors responded and the court thereupon denied the motion.

The fourth assignment of error relates to the admission in evidence of a statement made by defendant Fushimi to the district attorney before the indictment was found. At the request of the United States attorney the court allowed the Government to reopen its case after some of the defendants' testimony was in. The United States attorney thereupon introduced the statement made to him by Fushimi on December 10, 1912. Its introduction was objected to by the defense "on the part of the defendant Fushimi for the reason that it is a privileged communication; was taken when he was asked to make a statement to the district attorney, and that it can not be used without his consent". On the part of Itow it was objected to on the ground "that it is * * * hearsay, and that if the Government intended to use it as a confession or an admission from the codefendant Fushimi that they should have had separate indictments and separate trials and couldn't go in evidence without possibly prejudicing the jury against the defendant Itow". The United States attorney then said: "We submit it as a confession or admission on the part of Fushimi as to certain facts. It is true it isn't evidence against Itow, but they are tried together.

They did not ask for a separate trial." And again, "I offer it simply as evidence against Fushimi."

The statement in question was made in response to questions of the United States attorney, and through an interpreter. Fushimi had not been sworn. The statement was verified at the trial by the interpreter and the stenographer who transcribed it.

This statement differed in material respects from Fushimi's testimony on the stand. For example, Fushimi testified in court that he had gone to the China House in order to lock Dunn in, and that Dunn had then struck him and Nakayama; while in his previous statement he had asserted that he went there to use the water-closet; that he knocked on the door and Dunn let him in; that Dunn did nothing in his presence before striking Itow; and that the trouble began with Dunn's attack on Itow. The principal effect of the alleged confession was to impeach Fushimi's testimony on the stand. Indeed, Fushimi admitted the discrepancy and that he had lied in his statement to the United States attorney, alleging that he did so in order to shield Nakayama, Itow and himself. The statement also left the impression that Itow, though attacked first and knocked down by Dunn, had deliberately struck the latter with his sword.

The court did not specifically instruct the jury that the statement was evidence only against Fushimi, nor was it requested to do so.

The fifth, sixth and seventh assignments of error relate to alleged refusals by the court to give in-

structions requested by the defense. The requested instruction to which the fifth assignment relates, dealing with the effect of the testimony of defendants in court, was given in substance in the thirty-second and thirty-sixth instructions.

The sixth assignment of error is unfounded in point of fact, since the court did not refuse to give the instruction there recited, but gave it *verbatim*.

The seventh assignment of error relates to the court's refusal to instruct the jury that homicide was justifiable when committed to prevent the commission of a felony upon the person of the slayer or upon his servant, or in the lawful attempt to prevent a riot or preserve the peace. There was no evidence introduced which tended to raise this defense; the whole theory of the defense was that Dunn was killed unintentionally and by accident as the result of falling on Itow's sword. The court instructed the jury in detail that if they had reasonable doubt as to whether Dunn was thus accidentally killed they should acquit.

The eighth and last assignment of error apparently goes to the court's refusal to grant a new trial, alleging that the verdict was contrary to law, the instructions of the court, and the evidence, in that Itow was found guilty of first degree murder and Fushimi of manslaughter, whereas under the evidence and instructions they must have been guilty, if guilty at all, of the same degree of homicide.

THE COURT'S REFUSAL TO GRANT THE CONTINUANCE REQUESTED BY DEFENDANTS WAS WITHIN ITS SOUND DISCRETION, AND THAT DISCRETION WAS NOT ABUSED.

Section 2221 of the Compiled Laws of Alaska (Carter's Code of Criminal Procedure, sec. 112) provides:

That when an indictment is at issue upon a question of fact, and before the same is called for trial, the court may, upon sufficient cause shown by such affidavits as the defendant may produce, or the statement of the district attorney, direct the trial to be postponed to another day in the same term or to another term; and all affidavits and papers read on either side upon the application must be first filed with the clerk.

In *Hardy vs. United States* (186 U. S. 224) it was held:

That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question. (Citing *Goldsby vs. United States*, 160 U. S. 70; *Isaacs vs. United States*, 159 U. S. 487, 489, and authorities there cited.)

This case arose under this identical provision of the Alaska Code. It is too late, therefore, to doubt that the section confers the usual discretion upon the trial court in the matter of continuance.

Pickett vs. United States, 216 U. S. 456, 461;
Franklin vs. South Carolina, 218 U. S. 161,
 168.

There is no ground for asserting that this discretion was abused in the instant case. The circumstances heretofore outlined show that defendants' counsel had not used due diligence in summoning witnesses; that although defendants were indicted on December 13, and had been committed nearly five months previous, no attempt was made to obtain process for witnesses until December 20. Under these circumstances the court was justified, in view of the condition of its docket, in commencing the trial upon the date set.

Defendants suffered no prejudice from this ruling. The court granted two continuances of two days each pending the arrival of the witnesses, and the only difference made by its refusal to grant the continuance requested was that defendants' counsel was unable to see his witnesses before the trial commenced and thus to make an opening statement. This was at least as prejudicial to the Government as to the defense. The conclusion is inevitable that counsel refused to make this opening statement in order to preserve the exception on the record, feeling that he could do so without materially affecting his clients' chances. The immateriality of the matter to his mind is shown by his failure to renew the suggestion that he might make his statement at the commencement of defendants' case instead of at the beginning of the trial, although the court had not ruled upon it.

THE COURT'S PERMISSION TO THE JURY TO GO AT LARGE, AND THE REFUSAL TO DISCHARGE THE JURY, WERE NOT REVERSIBLE ERROR.

(a) *Permitting the jury to separate.*

Section 2247 of the Compiled Laws of Alaska (Carter's Code of Criminal Procedure, sec. 138) provides:

That when a case is finally submitted, the jurors must be kept together in some convenient place under the charge of an officer until they agree upon a verdict or are discharged by the court; * * * and if the jurors be permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse with, nor to suffer themselves to be addressed by, any person, nor to listen to any conversation on the subject of the trial, nor to form or express an opinion thereon, until the case is finally submitted to them.

The language of this provision seems to leave it to the discretion of the trial court whether or not to keep the jury together during the trial. The section is taken literally from Section 7312 of Bates' Annotated Ohio Statutes. Under that section it has been held that the matter is discretionary with the trial court even in capital cases. (*Bergin vs. State*, 31 Ohio St. 114, and cases cited.)

Under Section 198 of Hill's Annotated Code of Oregon, apparently in force in Alaska before the adoption of the Code of 1899, the matter was expressly left to the discretion of the court, and this

is held to apply in capital cases. (*State vs. Shaffer*, 23 Oreg. 555.)

This is a generally accepted rule. (Clark, Crim. Pro., 478; *Armstrong vs. Oklahoma*, 24 L. R. A. [N. S.] 776 and note; *Holt vs. United States*, 218 U. S. 245, 251.)

Clearly there was no abuse of discretion in the present case. As we have seen, the court took the utmost pains to instruct the jury in great detail concerning their duty not to listen to conversations upon the subject of the trial. The jury were permitted to separate by the express consent of counsel for the defendants as well as the United States attorney, the latter subsequently taking oath that this was done in order to get a better class of men on the jury. It would be a triumph of double-dealing to allow defendants to obtain a reversal on any such ground as this.

(b) *Refusal to discharge the jury.*

In *Mattox vs. United States* (146 U. S. 140, 150) the Supreme Court reversed the trial court for its failure to consider affidavits stating that a newspaper account of the trial highly prejudicial to the defendant had been read to the jury. The effect of the Mattox case is explained in *Holmgren vs. United States* (217 U. S. 509, 522), where it is said:

To the like effect is *Mattox vs. United States*, 146 U. S. 140, where the court below refused to entertain affidavits showing the reading of a newspaper, containing an unfavorable article, during the deliberations of the jury, and also damaging remarks of an officer in charge of the

jury during the progress of the trial. In both cases the basis of the action of the reviewing court was the refusal of the courts below to exercise the discretion vested in them by law.

Here there was no such failure to exercise the discretion vested in the trial court.

However, the question is hardly open to discussion since the decision in *Holt vs. United States* (218 U. S. 245). There the identical question arose. The Supreme Court, through Mr. Justice Holmes, stated the circumstances and the appropriate rule of law as follows:

We will take up in this connection another matter not excepted to but made one of the grounds for demanding a new trial, and also some of its alleged consequences, because they also involve the question how far the jury lawfully may be trusted to do their duty, when the judge is satisfied that they are worthy of the trust. The jurymen were allowed to separate during the trial, always being cautioned by the judge to refrain from talking about the case with any one and to avoid receiving any impression as to the merits except from the proceedings in court. The counsel for the prisoner filed his own affidavit that members of the jury had stated to him that they had read the Seattle daily papers with articles on the case while the trial was going on. He set forth articles contained in those papers, and moved for a new trial. The court refused to receive counter-affidavits, but, assuming in favor of the prisoner that the jurors had read the articles, he denied the motion. This court could not make that assumption if the result would be to order a new trial, but the probability that jurors, if allowed to separate, will see something of the public prints is so

obvious, that for the purpose of passing on the permission to separate it may be assumed that they did so in this case.

We are dealing with a motion for a new trial, the denial of which can not be treated as more than matter of discretion or as ground for reversal, except in very plain circumstances indeed. *Mattox vs. United States*, 146 U. S. 140. See *Holmgren vs. United States*, 217 U. S. 509. It would be hard to say that this case presented a sufficient exception to the general rule. The judge did not reject the affidavit, but decided against the motion on the assumption that more than it ventured to allege was true. As to his exercise of discretion, it is to be remembered that the statutes or decisions of many states expressly allow the separation of the jury even in capital cases. Other states have provided the contrary. The practice has varied, with perhaps a slight present tendency in the more conservative direction. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. Without intimating that the judge did not go further than we should think desirable on general principles, we do not see in the facts before us any conclusive ground for saying that his expressed belief that the trial was fair and that the prisoner has nothing to complain of is wrong. (pp. 250-251.)

That was a much stronger case for the defendant than is this. There it was assumed that the jurors had read the articles dealing with the case; here the trial judge was satisfied that they had not. There is nothing in the record to suggest that the court was misled in this matter. Counsel did not attempt to prove by affidavits or otherwise that a single member of the jury had read the article, but contented him-

self with the general statement (not sworn to) in his motion for a new trial that defendants believed the United States attorney gave out the interview to prejudice their case. This not only is denied by the United States attorney's affidavit and that of the newspaper man who was responsible for the story, but is unsupported by a single shred of evidence in the record.

It might be suggested that defendants in the present case are in a better position than the prisoner in the Holt case in that here the objection was made and exception taken at once, while there it was merely alleged as a ground for demanding a new trial. There is nothing in this distinction. Section 2248 of the Compiled Laws of Alaska (Carter's Code of Criminal Procedure, sec. 139) provides:

That the court discharge a jury without prejudice to the prosecution for the sickness of a juror, the corruption of a juror, or other accident or calamity, or because there is no probability of the jurors agreeing, and the reason for the discharge shall be entered on the journal.

Assuming that the influencing of the jury by adverse newspaper comment might be deemed an "accident or calamity", and so within the purview of this section, it is evident that the propriety of such discharge, like the granting of a new trial, is left to the discretion of the trial court. This is the accepted rule. (*Usborne vs. Stephenson*, 48 L. R. A. 432, 434, note.)

Since no abuse of that discretion has been shown, there is no question involved for this court to review.

The Statement of Fushimi was Properly Admitted.

If the alleged confession by Fushimi had been extorted from him under such circumstances of confinement, threats, promises, duress or intimidation as to render it involuntary its introduction in evidence against him would be a violation of his constitutional right not to incriminate himself. (*Bram vs. United States*, 168 U. S. 532.) There are several difficulties, however, in applying that doctrine to the present case.

In the first place, Fushimi's statement was not objected to on any such ground. It was not even intimated by counsel for the defense that the statement had been improperly extorted. The objection made was an entirely different one—that it was a privileged communication. This objection clearly did not go to the constitutional right of Fushimi. So far as its involuntary character is concerned, therefore, the statement must be assumed to have gone in evidence without objection on the part of defendants.

Besides, there is nothing in the record to indicate that the statement was involuntary. The circumstances under which it was made are not related in great detail nor as fully, doubtless, as they would have been if the prosecution's attention had been directed by an appropriate objection to the present question. The circumstances which appear, however, all tend to show its voluntary character. Fushimi was not a prisoner, nor in confinement; he was merely asked to make a statement to the United States attorney, and made it. It may safely be assumed that if there had been any facts indicating extortion or

the like they would have been brought to light by the defense.

Where defendants are jointly tried for a single offense, a previous statement made by one of them since the commission of the offense is admissible against him, even though not against the other defendant or defendants who were not present when the statement was made. (*Sparf & Hansen vs. United States*, 156 U. S. 51; *United States vs. Ball*, 163 U. S. 662; *Fitzpatrick vs. United States*, 178 U. S. 304.) In the *Sparf & Hansen* case the conclusion of the Supreme Court was:

We are of opinion that as the declarations of Hansen to Sodergren were not, in any view of the case, competent evidence against Sparf, the court, upon objection being made by counsel representing both defendants, should have excluded them as evidence against him, *and admitted them against Hansen*. (p. 58.)

In the *Ball* case the same court said, at page 672:

These two defendants moved that they be tried separately from Millard F. Ball, because he had been previously acquitted; because the government relied on his acts and declarations made after the killing and not in their presence or hearing; and because he was a material witness in their behalf. But the question whether defendants jointly indicted should be tried together or separately was a question resting in the sound discretion of the court below. *United States vs. Marchant*, 12 Wheat. 480. It does not appear that there was any abuse of that discretion in ordering the three defendants to be tried together,

or that the court did not duly limit the effect of any evidence introduced which was competent against one defendant and incompetent against the others. See *Sparf vs. United States*, 156 U. S. 51, 58. On the contrary, upon the offer by the United States of evidence of declarations made by Millard F. Ball after the killing and not in the presence of the other defendants, and upon an objection to its admissibility against them, the court at once said, in the presence of the jury, that, of course, it would be only evidence against him, if he said anything; *and the court was not afterwards requested to make any further ruling upon this point.*

It may be suggested that the court might well have instructed the jury specifically not to regard the statement as evidence against Itow; and such an instruction would undoubtedly have been appropriate. But the United States attorney, in introducing the confession, reiterated the assertion that it was offered as evidence only against Fushimi; the jury could therefore have been left in no doubt as to their duty in the premises. Besides, the suggestion that the court's failure to give specific instruction upon this point was error is answered by the passage above quoted from the Ball case. Here, as there, no instruction upon this point was asked; and it is a settled rule of practice that error can not be assigned to a failure to give an instruction not requested. (*Isaacs vs. United States*, *supra*, 491; *Humes vs. United States*, 170 U. S. 210.)

The objection on the part of Fushimi was that his statement to the district attorney was privileged.

Counsel evidently had in mind the familiar rule of criminal evidence—applied by the Supreme Court in *Vogel vs. Gruaz* (110 U. S. 311)—that a complaint to a prosecuting attorney of the commission of crime is a privileged communication. Even if this were such a disclosure, the privilege is that of the Government, not of the informer. (*Vogel vs. Gruaz, supra*, 316.)

But the doctrine of confidential communications is not applicable. Fushimi made no charge of crime. The district attorney was examining a number of witnesses to ascertain the true facts of the homicide. Each witness could refuse to talk only on the ground of self-incrimination. It is now too late to add to that constitutional protection another rule that any voluntary statement by a criminal can not be used if it happens to be made to an officer of the law.

Again, the substance of Fushimi's statement, in contradiction to his testimony, was contained in an affidavit made jointly by both defendants on their application for the summoning of witnesses. This affidavit was put in evidence to contradict them.

THE REJECTED INSTRUCTIONS OFFERED BY THE DEFENDANTS WERE BAD.

As before stated, one of these instructions, the refusal of which is assigned as error, was in fact given in terms by the court as No. 4.

Of the prayers refused, the first related to the weight to be given to the defendants' testimony and

the other to a homicide committed in preventing a felony or suppressing a riot.

As offered, both were erroneous. The law covering the different theories of the case was fully explained to the jury.

(a) The prayer covering the testimony of the defendants was given to the jury in substance. The court omitted from the instruction the following:

In a case of this kind you should determine whether that statement (of the defendants) is corroborated substantially by proven facts; if so it is strengthened to the extent of its corroboration. If it is not so strengthened in that way you are to weigh it by its own inherent truthfulness.

It was erroneous to refer to corroboration without mentioning contradiction; the suggestion was that the testimony was strengthened in the one case, but was not weakened in the other.

(b) The other instruction which was refused is:

You are instructed that the killing of a human being is justifiable when committed to prevent the commission of a felony upon the person of the slayer or upon his servant or in the lawful attempt to suppress a riot or preserve the peace. So in this case if you find and believe from the evidence that the deceased, Frank Dunn, was attempting to commit a felony upon the persons of Nakayama and Fushimi, and that Itow was the foreman in charge of said Nakayama and Fushimi, and that in the attempt on the part of Itow to prevent the commission of such felony, the deceased was killed; or if you have a reasonable doubt as to whether the deceased did not lose his life in that way then you must acquit.

It would also be your duty to acquit if you believe that at the time Itow reached the scene of the fatality there was a riot in progress or a breach of the peace was taking place and Itow was making a lawful attempt to suppress such a riot or preserve the peace or if you have a reasonable doubt as to whether the killing did not so occur in either case the defendants are not guilty.

There were no facts in evidence, and no theory was advanced on either side warranting such an instruction. It was therefore properly refused. (*Bird vs. United States*, 187 U. S. 118, 132.)

According to the testimony for the Government, the killing of Dunn was a wanton and premeditated murder by Itow; while the evidence of the defendants tended to show that it was purely accidental. The defense denied that Itow killed Dunn intentionally, either in self-defense or to prevent the commission of a crime by Dunn.

While the prayer is inartificially drawn and is broad enough to cover both an accidental and in intentional killing happening in an affray, it is clearly directed to an intentional killing in self-defense or to prevent a breach of the peace. This theory of the prayer was utterly inconsistent with defendants' testimony (of accidental killing), and for that reason was properly rejected. (*Fearson vs. United States*, 10 App. Cas., D. C. 536, 539.)

Aside from this inconsistency, the prayer is bad for many reasons.

There was no evidence that Dunn was attempting to

commit a felony. Fushimi's claim was that Dunn had assaulted him. This was a simple assault punishable by imprisonment for not more than six months (Comp. Laws of Alaska, sec. 1905), and therefore not a felony (*ibid*, sec. 2065). There was no riot; three men were fighting, which was an affray at the most. There was no evidence that Itow *attempted* to prevent a felony or breach of the peace or suppress a riot. Itow claimed that he went to the China House to protect his men, but no fighting was going on when he got there.

A "lawful" attempt to suppress a riot was not defined. Here is the real vice of the instruction. It is a practical statement that Itow was justified in killing Dunn in order to stop a fist fight between him, Fushimi, and Nakayama, even though Dunn was acting in self-defense and the fight might have been stopped in a less drastic way.

The essential qualification that the killing must be necessary, and that the violation of the law can not otherwise be suppressed, is omitted from the prayer. (Clark & Marshall, Crimes [2d ed.], pp. 383-385.)

The instructions actually given by the court fully stated the law applicable to the facts.

THE JUDGMENT CAN NOT BE REVERSED BECAUSE THE VERDICT WAS CON- TRARY TO THE EVIDENCE.

This has been asserted too often to require argument. (*Humes v. United States, supra; Crumpton v.*

United States, 138 U. S. 361; *Moore v. United States*, 150 U. S. 57, 61; *Johnson v. United States*, 228 U. S. 457, 459.)

The point of this objection is that one defendant was convicted of murder in the first degree and the other of manslaughter.

True, the jury might have found both defendants guilty of murder in the first degree. But there was ample evidence to justify their conclusion. If Itow purposely, and after deliberation and premeditation, killed Dunn, the verdict as to him was correct.

But if Fushimi himself had no purpose to kill, and did not know of Itow's intention to kill, he would be guilty of murder in the second degree at the most. And if the jury believed—finding some truth in the testimony on both sides—that Dunn struck Fushimi and knocked him down, and that Fushimi in the heat of passion resulting from the blow aided in the killing, their verdict of manslaughter was justified.

The verdict of guilty in different degrees is therefore perfectly proper.

Brown vs. State, 28 Ga. 199, 213;
Wharton on Homicide (3d ed.), sec. 440.

However, the matter arises on motion for a new trial. The action of the trial court on such motion is not assignable as error.

Pickett vs. United States, 216 U. S. 456;
Bucklin vs. United States, 159 U. S. 682;
Holmgren vs. United States, 217 U. S. 521.

We therefore respectfully ask that the judgment of the District Court be affirmed.

JNO. J. REAGAN,
United States Attorney for District of
Alaska, First Division,
Attorney for Defendant in Error,

JNO. W. PRESTON,
United States Attorney for Northern
District of California;

M. A. THOMAS,
Assistant United States Attorney for
Northern District of California,
Of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNION STEAMSHIP COMPANY, a Corporation,
Claimant of the American Steamship
"ARGYLL," Her Engines, Boilers, etc.,
Appellant,

vs.

GUALALA STEAMSHIP COMPANY, a Corporation,
Appellee.

Apostles.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer.....	12
Assignment of Errors.....	35
Certificate of Clerk U. S. District Court to Apostles	38
Claim of Union Steamship Company.....	11
Decree, Final.....	32
Decree, Interlocutory.....	29
Final Decree.....	32
Interlocutory Decree.....	29
Libel in Rem.....	7
Minutes of Court—September 16, 1913—Re Marshal's Return on Monition, Proclama- tion, etc.	18
Minutes—October 15, 1913—Hearing.....	20
Minutes of Court—October 16, 1913—Hearing (Resumed).....	21
Minutes of Court—November 18, 1913—Hearing (Resumed).....	22
Notice of Appeal.....	34
Opinion.....	24
Order Allowing Claimant 10 Days to Answer Libel.	18
Order Consolidating Case No. 15,327 With Case No. 15,355, etc.	18

Index.	Page
Order Consolidating Case No. 15,458 With Cases Nos. 15,329 and 15,335.	18
Order Consolidating Case No. 2516 With Case No. 2473.	42
Order Directing Entry of Decree, etc.	29
Order Granting Gualala S. S. Co. Five Days to Answer Libel.	18
Order Referring Causes to U. S. Commissioner to Ascertain and Report Damages, etc.	23
Order Submitting Causes on Briefs.	22
Praecipe for Apostles on Appeal.	1
Proclamation to Appear and Answer Libel.	18
Stipulation as to Damages.	30
Stipulation for Consolidation and Hearing of Case No. 2516 With Case No. 2473, etc.	40
Statement of Clerk United States District Court	2

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,327.

GUALALA STEAMSHIP COMPANY, a Corpora-
tion,

Libelant,

vs.

The Steamer "ARGYLL," Her Engines, Boilers,
Machinery, Tackle, Apparel, and Furniture,
Respondent.

THE UNION STEAMSHIP COMPANY, a Cor-
poration,

Claimant.

Praecipe for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore perfected in this court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

1. All those papers required by section 1 of paragraph 1 of Rule 4 of the rules of admiralty of the United States Circuit Court of Appeals for the Ninth Circuit; [1*]
2. All the pleadings in said cause and all the exhibits annexed thereto;
3. The stipulation waiving reference and agreeing upon the amount of damages;
4. The opinion and decision of the Court;

*Page-number appearing at foot of page of original certified Record.

5. The final decree and notice of appeal;
6. The assignment of errors.

IRA A. CAMPBELL,
 McCUTCHEN, OLNEY & WILLARD,
 Proctors for Claimant and Respondent.

[Endorsed]: Filed Nov. 7, 1914. W. B. Maling,
 Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*In the District Court of the United States, in and for
 the Northern District of California, First Divi-
 sion.*

No. 15,327.

GUALALA STEAMSHIP COMPANY, a Corpora-
 tion,

Libelant,

vs.

The Steamer "ARGYLE," Her Engines, Boilers,
 etc.,

Respondent.

Statement of Clerk United States District Court.

PARTIES.

Libelant: Gualala Steamship Company, a Corpora-
 tion.

Respondent: The steamer "Argyle," her engines,
 boilers, etc.

Claimant: Union Steamship Company. [3]

PROCTORS

for

Libelant: Ira S. Lillick, Esquire, San Francisco,
 California.

Respondent and Claimant: Messrs. McCutchen, Ol-

ney & Willard, and Ira A. Campbell, Esquire,
San Francisco, California.

PROCEEDINGS.

1912.

October 26. Filed verified Libel, for damages
caused by collision, in the sum of
\$38,000.00.

Issued Monition for attachment of
the steamer "Argyle," which said
Monition was, on October 28th,
returned and filed with the fol-
lowing return of the United States
Marshal endorsed thereon: "I
hereby certify and Return that I
received this Monition on the
26th day of October, 1912, at San
Francisco, California, and that
under [4] and by virtue of the
terms of a stipulation entered into
between the proctors for the re-
spective parties hereto, I made no
seizure of said steamer 'Argyle,'
her engines, boilers, etc., and re-
turn this writ accordingly.

C. T. ELLIOTT,

U. S. Marshal.

By Geo. H. Burnham,

Chief Office Deputy.

San Francisco, Cal., October 28,
1912."

Filed claim of Union Steamship
Company.

Filed stipulation (Bond) for release of steamer "Argyle," in the sum of \$40,000.00, with the National Surety Company, as surety.

1913.

March

6. Filed depositions of Fred Carlson, Ernest Comstedt, and Harry Deloss Gibbs, taken on behalf of libellant, before United States Commissioner Francis Krull.

July

17. Filed answer of Union Steamship Company, a corporation, owners of the steamship "Argyle." [5]

August

18. The Court this day ordered that this cause be consolidated for trial with the cause entitled Konstant Latz vs. The Steamer "Argyle," her Engines, etc., No. 15,335.

September

16. The Court this day ordered that this cause be consolidated for trial with causes entitled A. W. Beadle vs. American Steamship "Argyle," her Engines, etc. No. 15,329, Aslak Abrahamsen vs. The American Steamship "Argyle," her Engines, etc., No. 15,458, and Konstant Latz vs. The American Steamship "Argyle," her Engines, etc., No. 15,335.

October

15. The above-entitled causes, as heretofore consolidated, this day came on for hearing in the District

Court of the United States, for the Northern District of California, at the City and County of San Francisco, before the Honorable M. T. Dooling, Judge, and after hearing duly had, were continued until October 16th, 1913, for further hearing, on which last day said causes were submitted to the Court for decision.

November 18. The causes as heretofore consolidated were by leave of the Court first had, reopened for a further hearing, before the Honorable M. T. Dooling, Judge of the said Court, and were resubmitted to the Court for decision. [6]

1914.

May

6. The Court this day filed an opinion. Ordered that the causes entitled A. W. Beadle vs. Steamship "Argyle," No. 15,329, and Gualala Steamship Company, vs. Steamship "Argyle," No. 15,327 be referred to a United States Commissioner to ascertain and report the amount of damage sustained by libelants in said causes.
8. Filed two volumes of testimony taken in open court.
9. Filed interlocutory decree.

November 7. Filed stipulation as to amount of damage sustained by libellant, and waiving reference heretofore made to United States Commissioner.

Filed final decree.

Filed notice of appeal.

Filed assignment of errors.

November 12. Filed cost of supersedeas bond.

(Copies of the testimony and depositions, and all original exhibits introduced or filed in any of the above-consolidated causes have been transmitted to United States Circuit Court of Appeals for the Ninth Circuit in accordance with stipulation and order dated August 31st, 1914, a copy of which is included in the Apostles in the cause entitled Konstant Latz vs. Steamship "Argyle," No. 15,335, and therefore said copies and exhibits are omitted from this transcript.) [7]

*In the District Court of the United States, for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,327.

GUALALA STEAMSHIP COMPANY, a Corpora-
tion,

Libelant,

vs.

The Steamer "ARGYLE," Her Engines, Boilers,
Boats, Tackle, Apparel, Furniture and Ap-
purtenances,

Respondent.

Libel in Rem.

To the Honorable, the Judges of the District Court
of the United States, for the Northern District
of California:

The libel of Gualala Steamship Company, a cor-
poration, against the steamer "Argyle," her engines,
boilers, boats, tackle, apparel, furniture and appurte-
nances, in a cause of collision, civil and maritime,
alleges:

I.

That the libelant is and was, during all of the
times hereinafter mentioned, a corporation duly
formed, organized and existing under and by virtue
of the laws of the State of California, with its prin-
cipal place of business in the City and County of
San Francisco, said State, and is and was, during all
of said times, the owner of the steamship "Gualala,"
an American vessel, with a wooden hull, of about two

hundred and twenty-five (225) gross tons, registered.
[8]

II.

That respondent steamer is, as libelant is informed and believes and upon such information and belief alleges, an American vessel, with a steel hull, of about twenty-seven hundred and fifty-three (2753) gross tons, registered, and now in the waters of the San Francisco Bay, and within the jurisdiction of this Honorable Court.

III.

That heretofore, and on or about, to wit, the 15th day of October, 1912, at about three o'clock A. M. of said day, while proceeding on a southeasterly course in the Pacific Ocean, about twenty (20) miles southwest of Point Arena, said steamship "Gualala" was run into and so badly damaged by said steamship "Argyle" that said steamship "Gualala" immediately filled with water and turned turtle; that at, and for about twenty (20) minutes prior to the time of the collision, the weather was clear; that at, and prior to, the time of the collision there was no wind and the sea was smooth; that said steamship "Gualala" was in every respect seaworthy and fully and completely equipped and manned by the full complement of officers and crew, and at the time of, and prior to, said collision, was displaying all lights, and giving all signals, required by law, and was being carefully and cautiously navigated in accordance with the rules and regulations governing the navigation of steam vessels.

That said collision was due to no act of fault or

neglect on the part of the officers and crew of said steamship "Gualala," but was solely due to the careless and negligent navigation of respondent steamer, and particularly so in that when said vessels were about a half a mile apart, with the [9] masthead or range lights and only the red or port light of each vessel visible from the other, said steamship "Gualala" blew one blast of her whistle and ported her helm and said steamship "Argyle" answered said blast by blowing one blast of her whistle but starboarded her helm instead of putting it to port and that immediately thereafter, notwithstanding that the engines of the "Gualala" were reversed and run full speed astern, said steamship "Argyle" ran into and sank said steamship "Gualala."

IV.

That by reason of said collision, said steamship "Gualala" suffered such damage as to become a total loss, and libelant has been damaged thereby and by the loss of said steamship's freight in the sum of Thirty-eight Thousand (38,000) Dollars.

V.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law, according to the course of this Honorable Court, in cases of admiralty and maritime jurisdiction, may issue against the said steamer "Argyle," her engines, boilers, boats, tackle, apparel, furniture and appurtenances, and that all persons having any interest thereon may be cited to appear and answer,

on oath, all and singular the matters aforesaid; and that this Honorable Court will be pleased to decree the payment of the damages, as aforesaid, with interest, and costs, and that said vessel may be condemned and sold to pay the same; and that [10] libelant may have such other and further relief as in law and justice it may be entitled to receive.

GUALALA STEAMSHIP COMPANY.

By FRED LINDERMAN,
Its President.

IRA S. LILLICK,
Proctor for Libelant.

United States of America,
Northern District of California,—ss.

Fred Linderman, being first duly sworn, on oath, deposes and says: That he is an officer of the corporation libelant in the above-entitled action, to wit, the President thereof; that he has read the foregoing libel, knows the contents thereof and believes the same to be true.

FRED LINDERMAN.

Subscribed and sworn to before me this 26 day of October, 1912.

[Seal] C. W. CALBREATH,
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Oct. 26, 1912. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

In the District Court of the United States of America, Northern District of California.

IN ADMIRALTY—No. 15,327.

GUALALA STEAMSHIP COMPANY,

Libellant,

vs.

The Steamship “ARGYLE,” Her Engines, Boilers,
etc.,

Respondent.

Claim of Union Steamship Company.

To the Honorable JOHN J. DE HAVEN, Judge of
the District Court of the United States for the
Northern District of California:

The claim of Union Steamship Company to the
steamship “Argyle,” her tackle, apparel and furni-
ture, now in the custody of the marshal of the United
States for the said Northern District of California,
at the suit of said Gualala Steamship Company, al-
leges:

That it is the true and *bona fide* owner of the said
steamship “Argyle,” her tackle, apparel and furni-
ture, and that no other person is owner thereof.

Wherefore, this claimant prays that this Honor-
able Court will be pleased to decree a restitution of
the same to it, and otherwise right and justice to
administer in the premises.

UNION STEAMSHIP COMPANY,

By W. G. TUBBY,

President.

IRA A. CAMPBELL,

Proctor for Claimant.

Northern District of California,—ss.

Subscribed and sworn to before me this 26th day of Oct., A. D. 1912.

[Seal]

FRANCIS KRULL,
Deputy Clerk, U. S. District Court, Northern District of California. [12]

[Endorsed]: Filed Oct. 26, 1912. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [13]

In the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,327.

THE GUALALA STEAMSHIP COMPANY,
Libelant,

vs.

The Steamer "ARGYLL," Her Engines, Boilers, Boats, Tackle, Apparel, Furniture and Appurtenances,

Respondent.

UNION STEAMSHIP COMPANY, a Corporation,
Claimant.

Answer.

To the Honorable WM. C. VAN FLEET, Judge of the United States District Court for the Northern District of California:

The answer of the Union Steamship Company, a corporation, to the libel of the Gualala Steamship Company, a corporation, respectfully admits, denies and alleges, as follows:

I.

Claimant admits the allegations of paragraph I of said libel. [14]

II.

Claimant admits the allegations of paragraph II of said libel.

III.

Answering unto the allegations of paragraph III of said libel, claimant admits that, heretofore, on or about the 15th day of October, 1912, at about three o'clock A. M. of said day, while proceeding on a general southeasterly course in the Pacific Ocean, approximately 20 miles southeast of Point Arena, said steamship "Gualala" was run into and so badly damaged by said steamship "Argyll" that said steamship "Gualala" immediately filled with water and turned turtle, and admits that at, and for more than twenty minutes prior to, the time of the collision, the weather was clear, and that at, and prior to, the collision there was no wind and the sea was smooth. Claimant has no knowledge as to whether said "Gualala" was in every respect seaworthy and fully and completely equipped and manned by a full complement of officers and crew, and therefore demands that proof of the same be made. Claimant admits that at the time of, and prior to, said collision said "Gualala" was displaying all lights, but denies that she was giving all signals required by law, and denies that she was being carefully and cautiously navigated in accordance with the rules and regulations governing navigation of steam vessels.

Claimant denies that said collision was due to no

act or fault or neglect on the part of the officers and [15] crew of said steamship "Gualala," and denies that said collision was solely, or at all, due to the careless and negligent navigation of said steamship "Argyll." Claimant denies that when said vessels were about half a mile apart the masthead or range lights and only the red, or port, light of each vessel was visible from the other, and denies that while in such position, the steamship "Gualala" blew one blast on her whistle and ported her helm, and that said steamship "Argyll" answered said blast by blowing one blast on her whistle, but starboarded her helm instead of putting it to port, and denies that immediately thereafter notwithstanding that the engines of the "Gualala" were reversed and run full speed astern, said steamship "Argyll" ran into and sank said steamship "Gualala." Claimant particularly denies that when said vessels were about half a mile apart, the red, or port, light of each vessel was visible from the other, and in that behalf alleges that when said vessels were about half a mile apart, the masthead or range lights, and only the green, or starboard, light of each vessel was visible from the other, and that while in such positions said steamship "Gualala" blew one blast on her whistle and ported her helm, and started across the bows of said "Argyll," and that thereupon, to avoid said collision, said "Argyll" ported her helm and blew one blast on her whistle to indicate to said "Gualala" that she was altering her course to starboard, and immediately thereafter, collision impending, said "Argyll" reversed full speed astern and gave three

[16] blasts on her whistle to indicate such maneuver, but notwithstanding such efforts to avoid said collision, the "Argyll" struck the "Gualala" on the port bow, a short distance aft the stem. Except as herein admitted, claimant denies the remaining allegations of said paragraph.

IV.

Answering unto the allegations of paragraph IV of said libel, claimant denies that by reason of said collision, said steamship "Gualala" suffered such damages as to become a total loss, and denies that libelant has been damaged thereby, and by the loss of said steamship's freight in the sum of thirty-eight Thousand (38,000) Dollars.

V.

Answering unto the allegations of paragraph V of said libel, claimant denies that all and singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Further answering unto the allegations of said libel, claimant alleges:

I.

That while proceeding on a NW. $\frac{1}{2}$ W. course at a point approximately 20 miles southeast of Point Arena, the steamship "Argyll" came into collision with the steamer [17] "Gualala," striking the latter on her port bow approximately 11 feet abaft her stem; that the sea was smooth and the night clear, and said vessels approached each other on practically opposite courses, starboard to starboard, the mast-head light and green light of the "Gualala" having

been first observed by those in charge of the navigation of the "Argyll" at about a point to a point and a half on the latter's starboard bow when the vessels were approaching one and one-half miles apart; that said vessels continued to approach, green light to green light, until they were within two or three ship's lengths apart, when the "Gualala" suddenly blew a single blast on her whistle and ported her helm, showing both running lights, and then her red light alone to the "Argyll," and started to cross the course of the latter; that upon such alteration of course on the part of the "Gualala," the officer in charge of the "Argyll," seeing that collision could only be avoided by quickly swinging the "Argyll's" head to starboard, ported her helm, and blew a single blast on her whistle to advise the "Gualala" of such maneuver, and then immediately reversed full speed astern on her engines and gave the required signal of three blasts to the "Gualala"; but despite every effort of the "Argyll" to avoid said collision, the two vessels came together, striking practically head on.

II.

That said steamship "Argyll" was in all respects seaworthy; fully manned, equipped and supplied, and said [18] collision was due to no fault or error in her navigation, but was solely caused by the afore-said negligence of said steamer "Gualala" in attempting, without cause, to cross the bows of said "Argyll" at a time which made collision inevitable.

III.

That all and singular the premises are true, and

within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, claimant prays that the above-entitled action may be dismissed with costs.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant. [19]

State of California,
City and County of San Francisco,—ss.

W. G. Tubby, being first duly sworn, on oath, deposes and says:

That he is the president of the Union Steamship Company, a corporation, claimant herein; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

W. G. TUBBY.

Subscribed and sworn to before me this 16th day of July, 1913.

[Seal] FLORA HALL,
Notary Public in and for the City and County of
San Francisco, State of California. [20]

Service of the within Answer and receipt of a copy is hereby admitted this 17th day of July, 1913.

IRA S. LILLICK,
Proctors for Libellant.

[Endorsed]: Filed Jul. 17, 1913. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

**[Order Consolidating Case No. 15,327 With Case
No. 15,355, etc.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 18th day of August, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#15,327.

GUALALA S. S. CO.

vs.

Str. "ARGYLE," etc.

By the Court ordered that this cause be and the same is hereby consolidated with case #15,335 for trial and set for October 1, 1913, for trial. [22]

**[Minutes of Court—September 16, 1913—Re
Marshal's Return on Monition, Proclamation,
etc.]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 16th day of September, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable

WM. C. VAN FLEET, and the Honorable M. T.
DOOLING, Judges.

#15,458.

Before DOOLING, Judge.

ASLAK ABRAHAMSEN

vs.

The Am. Steamship "ARGYLE," etc., et al.

The U. S. Marshal having made return to the monition issued herein that "I hereby certify and return that I received the within writ at San Francisco, California, on August 29th, 1913, and herewith return the same for the reason that a bond was given for the release of said steamship without seizure being made."

On motion of S. T. Hogevoll, Esqr., proclamation was duly made for all persons having anything to say to appear and answer the libel herein, and on motion of Joe McKeon, Esqr., by the Court ordered that claimant of S. S. "Argyle" have ten days to answer the said libel. On motion of Ira S. Lillick, Esqr., Gualala S. S. Co., granted 5 days to answer said libel. Further ordered that this cause be and the same is hereby consolidated with causes numbered 15,327, 15,329, 15,335, respectively, for all further proceedings to be had. [23]

[Minutes—October 15, 1913—Hearing.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 15th day of October, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

#15,327, 15,335, 15,458 and 15,329.

THE GUALALA S. S. CO. et al.

vs.

The Am. S. S. "ARGYLE," etc.

These causes as consolidated for trial, this day came on for hearing, Ira S. Lillick, Esqr., and L. A. Redman, Esqr., appearing for libelant, The Gualala S. S. Co., F. R. Wall, Esqr., for libelant K. Latz, S. T. Hogevooll, Esqr., for libelant A. Abrahamsen. Mr. Lillick stated cause and called Fred Linderman, who was duly sworn and examined as a witness on behalf of the libelant, The Gualala S. S. Co., and read and introduced in evidence depositions taken on behalf of said libelant before a United States Commissioner, and called Louis d'Curtoni and Martin Kalnin, who were each duly sworn and examined as witnesses on behalf of libelant. Libelant introduced certain exhibits, which were marked "Libelant's Exhibits 1, 2 and 3, respectively.

Mr. Campbell called D. S. McAlpine, who was duly sworn and examined for claimant, and introduced

in evidence certain exhibits, which were marked Claimant's Exhibits "A" and "B" respectively. The further hearing was thereupon continued until to-morrow. [24]

**[Minutes of Court—October 16, 1913—Hearing
(Resumed).]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 16th day of October, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

“ARGYLE”—#15,327, 15,329, 15,335, 15,458.

The further hearing of these causes as consolidated was resumed. Mr. Campbell called Richard Dixon, who was duly sworn and examined on behalf of claimant. Mr. Hogevoll called Thos. W. Connolley, who was duly sworn and examined on behalf of libelant Abrahamsen. Mr. Campbell called John Hansen, Andrew Forbosen and Benjamin Sanford, George Curtis, James Dickey, A. F. Pillsbury, David Dickey, Frank E. Ferris, who were each duly sworn and examined as witnesses on behalf of claimant. Mr. Hogevoll called Aslak Abrahamsen, who was duly sworn and examined in his own behalf. Mr. Wall called K. Latz, who was duly sworn and examined in his own behalf. Mr. Lillick called John H. Rinder and Jacob Stack, who were each duly sworn and ex-

amined on behalf of libelant The Gualala S. S. Co., in rebuttal. Aslak Abrahamsen was also recalled. Mr. Campbell recalled Richard Dixon for further examination. The causes were then submitted to the Court for decision upon briefs to be filed in 10, 10 and 5 days. Claimant introduced exhibits marked "C," "D" and "E." Libelant Abrahamsen introduced an exhibit which was marked "A." [25]

**[Minutes of Court—November 18, 1913—Hearing
(Resumed).]**

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 18th day of November, in the year of our Lord one thousand nine hundred and thirteen. Present: The Honorable M. T. DOOLING, Judge.

"ARGYLE" and "GUALALA"—#15,327, 15,335, 15,458, 15,329.

These causes as consolidated this day came on for further hearing. Ira S. Lillick, Esqr., F. R. Wall, Esqr., and Ira A. Campbell, Esqr., appearing. Mr. Lillick called L. Curtis, who was duly sworn and examined. The following exhibits were introduced in evidence. "Beadle's Ex. marked 4 and Claimant's Exhibit marked "F." The causes were then submitted on briefs to be filed in 10, 10 and 5 days. [26]

[Order Referring Causes to U. S. Commissioner to Ascertain and Report Damages, etc.]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 6th day of May, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable M. T. DOOLING, District Judge.

No. 15,327, 15,329, 15,335 and 15,458.

GUALALA STEAMSHIP COMPANY et al.

vs.

The Am. Stmr. "ARGYLE,"

and

THE GUALALA STEAMSHIP CO., etc.

The Court this day filed its written Opinion and Order that a Decree be entered in favor of the libelants in said cases and fixing the liability of the "Argyle." Further ordered that said causes be, and they are hereby, referred to a United States Commissioner to ascertain and report the damages suffered by the libelants, A. W. Beadle and the Gualala Steamship Company. [27]

[Opinion.]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,327.

GUALALA STEAMSHIP COMPANY, a Corpora-
tion,

Libelant,

vs.

The Steamer "ARGYLE," Her Engines, Boilers,
etc.,

Respondent.

THE UNION STEAMSHIP COMPANY, a Cor-
poration,

Claimant.

No. 15,329.

A. W. BEADLE,

Libelant,

vs.

The Steamer "ARGYLE," etc.,

Respondent.

THE UNION STEAMSHIP COMPANY, a Cor-
poration,

Claimant.

No. 15,335.

KONSTANT LATZ,

Libelant,

vs.

The American Steamship "ARGYLE," and THE
GUALALA STEAMSHIP COMPANY, a
Corporation,

Respondent.

THE UNION STEAMSHIP COMPANY, a Cor-
poration,

Claimant. [28]

No. 15,458.

ASLAK ABRAHAMSEN,

Libelant,

vs.

The American Steamship "ARGYLE," and THE
GUALALA STEAMSHIP COMPANY, a
Corporation,

Respondent.

THE UNION STEAMSHIP COMPANY, a Cor-
poration,

Claimant.

IRA S. LILLICK, Esq., Proctor for Gualala
Steamship Company, a Corporation, and
A. W. Beadle, Libelants.

F. R. WALL, Esq., Proctor for Konstant Latz,
Libelant.

S. T. HOGEVOLL, Esq., Proctor for Aslak
Abrahamsen, Libellant.

IRA A. CAMPBELL, Esq., McCUTCHEN,
OLNEY & WILLARD, Proctors for Claim-
ant.

These cases arise out of an accident in which two vessels propelled by steam, under full control and having the whole Pacific Ocean in which to maneuver, collided on a clear night, when the lights of each were easily discernible to the other while they were yet miles apart. As is usual in such cases, with each vessel endeavoring to throw the blame upon the other, the testimony is quite voluminous and very conflicting, and I cannot find the requisite time to review it in this decision. From established facts, however, I am of the opinion that the “Argyle,” must [29] be held responsible for the collision for the following reasons:

I. For inefficiency of the look-out in not reporting when the “Gualala’s” red light and her green light were visible at the same time, and in not reporting when he lost her green light and picked up her red light alone.

II. For negligence on the part of McAlpine, the Deck Officer, in not observing the “Gualala’s” course because of his failure to note when her red light and her green light were visible together, and when her green light disappeared from view; because of his failure to observe her red light until warned by her whistle; and because of the fact that when the “Gualala’s” lights were first sighted he contented himself with directing the quartermaster “not to let

her come any closer," apparently paying no further attention to her until warned by her whistle when it was too late to avoid a collision.

The log of the chief officer of the "Argyle" shows that seven minutes elapsed from the time the look-out reported the "Gualala's" light until the blowing of her whistle. At what period of this interval it should have been apparent to the navigator of the "Argyle" that the "Gualala" was on a crossing course upon the "Argyle's" starboard side cannot now be determined, but it is clear that it should have been known to him earlier than it was, and at least at the time when both lights were visible to the look-out, and not reported, and at a time when, if Mc-Alpine were watching, he would have seen both lights together, the green light disappear, and the red alone remain in [30] view. Had these things been observed, earlier precautions could have been taken by the "Argyle" to avoid the collision, which Mc-Alpine declares was inevitable when the warning whistle of the "Gualala" called his attention to her course and proximity. Much expert testimony was introduced to show that the collision could not have occurred in the manner testified to by Gibbs, but the value of this testimony depends upon the accuracy of estimates of time, courses and distances. Such estimates are of necessity more or less uncertain. With a full appreciation of the seriousness of my conclusion to the "Argyle," I am nevertheless convinced that had the look-out and the deck officer on that vessel been as attentive to their duties as the

occasion required the collision could not have occurred.

A decree will be entered accordingly establishing the liability of the "Argyle," and referring the cause to the commissioner to ascertain and report the damage suffered by libelants A. W. Beadle and Gualala Steamship Company. As to libelant Aslak Abrahamson a decree will be entered awarding him damages in the sum of \$3,621.00. As to libelant Konstant Latz a decree will be entered awarding him damages in the sum of \$3,500.00.

Each libelant will recover costs.

May 6th, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May 6, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [31]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,437.

At a stated term of the District Court of the United States of America, for the Northern District of California, held in the city of San Francisco, on Saturday, the 9th day of May, in the year of our Lord one thousand nine hundred and fourteen (1914). Present: The Honorable MAURICE T. DOOLING, District Judge.

GUALALA STEAMSHIP COMPANY, a Corporation,
tion,

Libelant,

vs.

The Steamer "ARGYLE," Her Engines, Boilers,
Machinery, Tackle, Apparel and Furniture,
Respondent.

THE UNION STEAMSHIP COMPANY, a Corporation,
poration,

Claimant.

Interlocutory Decree.

The above-entitled cause having been heard on the pleadings and proofs in said cause, and having been argued by the proctors for the respective parties, and having been heretofore submitted to the Court for decision;

IT IS NOW ORDERED, ADJUDGED AND DECREED by the Court that the libelant do have and recover from the respondent the amount due to it for damages sustained by it by reason of the collision between the steamer "Gualala" and the steamer "Argyle," as alleged in the libel on file herein; [32]

AND IT IS FURTHER ORDERED that the said cause be referred to Francis Krull, Esq., commissioner, to ascertain and compute the amount due to the libelant in the premises and to report the same to this court.

Done this 9th day of May, 1914.

M. T. DOOLING,

Judge.

[Endorsed]: Filed and entered May 9, 1914.
W. B. Maling, Clerk. By C. W. Calbreath, Deputy
Clerk. [33]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,327.

GUALALA STEAMSHIP COMPANY, a Corpora-
tion,

Libellant,

vs.

The Steamer "ARGYLL," Her Engines, Boilers,
Machinery, Tackle, Apparel and Furniture,
Respondent.

THE UNION STEAMSHIP COMPANY, a Cor-
poration,

Claimant.

Stipulation as to Damages.

WHEREAS, an interlocutory decree was on the 9th day of May, 1914, entered in the above-entitled cause, ORDERING, ADJUDGING AND DECREERING that libellant have and recover from respondent and claimant the amount due it for damages sustained by reason of the collision between the steamer "Gualala," and the steamer "Argyll"; and,

WHEREAS, it was further ordered that said cause be referred to Francis Krull, Esquire, United States Commissioner, to ascertain and compute the amount due libellant in the premises, and to report the same to this Court;

NOW, THEREFORE, IT IS HEREBY STIPULATED and AGREED by and between the respective parties hereto that the damages sustained by libelant by reason of the collision between the [34] steamer "Argyll" and the steamer "Gualala" was the sum of twenty-five thousand two hundred fifty (25,250) dollars;

IT IS FURTHER STIPULATED AND AGREED by and between the said parties that the reference to Francis Krull, Esquire, United States Commissioner, to ascertain and compute said damages is hereby waived.

Dated: San Francisco, California, November 5, 1914.

IRA S. LILLICK,

Proctor for Libelant.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent and Claimant.

[Endorsed]: Filed Nov. 7, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [35]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,327.

GUALALA STEAMSHIP COMPANY, a Corpora-
tion,

Libelant,

vs.

The Steamer "ARGYLL," Her Engines, Boilers,
Machinery, Tackle, Apparel and Furniture,
Respondent.

THE UNION STEAMSHIP COMPANY, a Cor-
poration,

Claimant.

Final Decree.

The above-entitled cause having come on to be duly and regularly heard before the Honorable M. T. Dooling, Judge of the above-entitled court, libelant appearing by its proctor, Ira S. Lillick, Esquire, and claimant by its proctors, Ira A. Campbell, Esquire, and Messrs. McCutchen, Olney & Willard, and the Court having filed its opinion herein; and,

It appearing that the Court, heretofore, on the 9th day of May, 1914, made and entered an interlocutory decree in accordance with its said opinion, wherein it ORDERED, ADJUDGED AND DECREED that libelant have and recover from respondent and claimant the amount due it for damages sustained [36] by reason of the collision between the steamer "Gualala" and the steamer "Argyll," and ordered that said cause be referred to Francis Krull, Esquire,

United States Commissioner, to ascertain and compute the amount due to libelant in the premises, and to report the same to the Court; and,

It further appearing that the parties hereto have, by written stipulation filed herein, stipulated and agreed that the damages sustained by libelant by reason of the collision between said steamer "Gualala" and said steamer "Argyll" was the sum of twenty-five thousand two hundred fifty (25,250) dollars, and have further stipulated that the aforesaid reference to Francis Krull, Esquire, United States Commissioner, to ascertain and compute said damages be waived;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Gualala Steamship Company, a corporation, libelant herein, do have and recover of and from the Union Steamship Company, a corporation, claimant herein, the sum of twenty-five thousand two hundred fifty (25,250) dollars, with interest thereon at the rate of six (6) per cent per annum from October 15, 1912, until paid, together with its taxable costs in said cause.

Dated: November 7, 1914.

M. T. DOOLING,
Judge. [37]

[Endorsed]: Filed Nov. 7, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [38]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,327.

GUALALA STEAMSHIP COMPANY, a Corpora-
tion,

Libelant,

vs.

The Steamer "ARGYLL," Her Engines, Boilers,
Machinery, Tackle, Apparel and Furniture,
Respondent.

THE UNION STEAMSHIP COMPANY, a Cor-
poration,

Claimant.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to the
Libelant, and to Ira S. Lillick, Esq., Its Proctor:

You and each of you will hereby please take notice
that The Union Steamship Company, a corporation,
claimant and respondent herein, hereby appeals from
the final decree made and entered herein in this
cause on the seventh day of November, 1914, to the
next United States Circuit Court of Appeals for the
Ninth Circuit, in and for said Circuit, at the City
and County of San Francisco, State of California.

Dated: November 7, 1914.

IRA A. CAMPBELL,

McCUTCHEM, OLNEY & WILLARD,

Proctors for Claimant and Respondent. [39]

Service of the within notice of appeal and receipt

of a copy is hereby admitted this 7 day of November, 1914.

IRA S. LILLICK,
Proctor for Libelant.

[Endorsed]: Filed Nov. 7, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [40]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY—No. 15,327.

GUALALA STEAMSHIP COMPANY, a Corpora-
tion,

Libelant,

vs.

The Steamer "ARGYLL," Her Engines, Boilers,
Machinery, Tackle, Apparel and Furniture,
Respondent.

THE UNION STEAMSHIP COMPANY, a Cor-
poration,

Claimant.

Assignment of Errors.

Now comes UNION STEAMSHIP COMPANY, claimant and appellant herein, and says that in the record, opinion, decision and final decree in said cause there is manifest and material error, and said appellant now makes, files and presents the following assignment of errors, on which it relies, to wit:

1. That the District Court erred in rendering the decree herein of date the 7th day of November, 1914, against the steamer "Argyll."

2. That the District Court erred in holding and deciding that the said steamer "Argyll" was in any way at fault in the collision with the steamer "Gualala." [41]

3. That the District Court erred in holding and deciding that the said steamer "Argyll" was in fault for inefficiency of the lookout in not reporting when the "Gualala's" red light and her green light were visible at the same time, and in not reporting when he lost her green light and picked up her red light alone.

4. That the District Court erred in holding and deciding that there was inefficiency of the lookout in not reporting when the "Gualala's" red light and her green light were visible at the same time, and in not reporting when he lost her green light and picked up her red light alone.

5. That the District Court erred in holding and deciding that the said steamer "Argyll" was in fault because of negligence on the part of McAlpine, the deck officer, in not observing the "Gualala's" course, because of his failure to note when her red light and her green light were visible together and when her green light disappeared from view.

6. That the District Court erred in holding and deciding there was any negligence on the part of McAlpine, the deck officer, in not observing the "Gualala's" course, because of his failure to note when her red light and her green light were visible together and when her green light disappeared from view.

7. That the District Court erred in holding and

deciding that the said steamer "Argyll" was in fault because of McAlpine's failure in observing the "Gualala's" red light until warned by her whistle.

8. That the District Court erred in holding and deciding that there was any negligence because of McAlpine's failure in observing the "Gualala's" red light until warned [42] by her whistle.

9. That the District Court erred in holding and deciding that the said steamer "Argyll" was in fault because of the fact that when the "Gualala's" light was first sighted McAlpine contented himself with directing the quartermaster not to let her come any closer.

10. That the District Court erred in holding and deciding that there was any negligence on McAlpine's part because of the fact that when the "Gualala's" light was first sighted he contented himself with directing the quartermaster not to let her come any closer.

11. That the District Court erred in holding that seven minutes elapsed from the time the lookout reported the "Gualala's" light until the blowing of her whistle.

12. That the District Court erred in holding and deciding that the lookout and deck officer of said steamer "Argyll" were inattentive to their duties.

13. That the District Court erred in allowing libellant excessive damages.

14. That the District Court erred in not holding the steamer "Gualala" solely in fault for the collision between it and the said steamer "Argyll."

In order that the foregoing assignment of errors

may be and appear of record, said appellant files and presents the same and prays that such disposition be made thereof as is in accordance with the law and the statutes of the United States in such cases made and provided, and [43] said appellant prays a reversal of the decree herein heretofore made and entered in the above cause and appealed from.

Dated: November 7, 1914.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Claimant and Respondent.

Receipt of a copy of the within assignment of errors is hereby admitted this 7 day of November, 1914.

IRA S. LILLICK,
Proctor for Libelant.

[Endorsed]: Filed Nov. 7, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [44]

**[Certificate of Clerk U. S. District Court to
Apostles.]**

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and hereunto annexed 44 pages, numbered from 1 to 44, inclusive, contain a full, true, and correct transcript of the records and proceedings as the same now remain on file and of record in the clerk's office of said District Court, in the cause entitled Gualala Steamship Company, a Corporation, vs. The Steamer "Argyle," Her Engines, etc., No. 15,327, and which said apostles on appeal are made up pursuant to and

in accordance with Section One of Rule Four of the Rules in Admiralty of the United States Circuit Court of Appeals, for the Ninth Circuit, as well as "Praeipie for Apostles on Appeal" (copy of which is embodied herein), and the instructions of proctors for claimant and appellant herein.

I further certify that the costs of preparing and certifying the foregoing Apostles on Appeal is the sum of Twenty-one Dollars and Ten Cents (\$21.10), and that the same has been paid to me by the proctors for appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 12th day of November, A. D. 1914.

[Seal]

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [45]

[Endorsed]: No. 2516. United States Circuit Court of Appeals for the Ninth Circuit. Union Steamship Company, a Corporation, Claimant of the American Steamship "Argyll," Her Engines, Boilers, etc., Appellant, vs. Gualala Steamship Company, a Corporation, Appellee. Apostles. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed November 12, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2516.

UNION STEAMSHIP COMPANY, a Corpora-
tion, Claimant of the American Steamship
"ARGYLL," Her Engines, Boilers, etc.,
Appellant,

vs.

GUALALA STEAMSHIP COMPANY, a Corpora-
tion,

Appellee.

**Stipulation for Consolidation [and Hearing of Case
No. 2516 With Case No. 2473, etc.].**

IT IS HEREBY STIPULATED AND
AGREED by and between the respective parties
hereto that the above-entitled cause may be con-
solidated and heard with the cause of Union Steam-
ship Company, a Corporation, Claimant of the
American Steamship "Argyll," Her Engines,
Boilers, etc., vs. Konstant Latz, and numbered
herein 2473, and that the record and briefs in said
last mentioned cause shall be considered with and as

a part of the record on file herein in the above-entitled cause.

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.
IRA S. LILLICK and
L. A. REDMAN,
Proctors for Appellee.

[Endorsed]: No. 2516. In the United States Circuit Court of Appeals for the Ninth Circuit. Union Steamship Company, a Corporation, etc., Appellant, vs. Gualala Steamship Company, a Corporation, Appellee. Stipulation for Consolidation. Filed Nov. 12, 1914. F. D. Monckton, Clerk.

At a stated term, to wit, the October Term, A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday, the twelfth day of November, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable CHARLES E. WOLVERTON, District Judge.

No. 2516.

UNION STEAMSHIP COMPANY, a Corporation,
Claimant of the American Steamship
“ARGYLL,” Her Engines, Boilers, etc.,
Appellant,

vs.

GUALALA STEAMSHIP COMPANY, a Corporation,
Appellee.

**Order Consolidating Case No. 2516 With Case No.
2473.**

Pursuant to the stipulation of counsel for the respective parties this day filed therefor, it is ORDERED that the above-entitled cause be, and hereby is consolidated for hearing with the cause entitled Union Steamship Company, a Corporation, claimant of the American Steamship “Argyll,” Her Engines, Boilers, etc., Appellant, vs. Konstant Latz, Appellee, No. 2473, and that the record and briefs in the last-mentioned cause shall be considered with and as a part of the record on file herein in the above-entitled cause.

United States
Circuit Court of Appeals
For the Ninth Circuit.

PACIFIC PHONOGRAPH COMPANY, a Corpo-
ration,

Appellant,

vs.

SEARCHLIGHT HORN COMPANY, a Corpora-
tion,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Northern District of California, Second Division.

Filed

FEB 13 1915

F. D. Munckton,
Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit.

PACIFIC PHONOGRAPH COMPANY, a Corporation,

Appellant,

vs.

SEARCHLIGHT HORN COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Northern District of California, Second Division.

INDEX TO THE PRINTED TRANSCRIPT OF
RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of D. Hadsell.....	48
Affidavit of A. R. Pommer.....	42
Amended Answer.....	28
Answer to Defendant's Petition to Enjoin Prosecution of Suits, Plaintiff's.....	56
Assignment of Errors.....	71
Attorneys, Names and Addresses of.....	1
Bill of Complaint.....	1
Bond on Appeal.....	75
Certificate of Clerk U. S. District Court to Record on Appeal.....	80
Citation on Appeal.....	81
Defendant's Petition to Enjoin Prosecution of Suits for Infringement.....	31
Names and Addresses of Attorneys.....	1
Notice of Motion.....	40
Order Allowing Appeal, etc.....	74
Order Denying Petition to Enjoin the Prosecution of Suit.....	55
Order Extending Time to File Record and to Docket Cause.....	83
Petition for Order Allowing Appeal.....	70

Index.

Page

Plaintiff's Answer to Defendant's Petition to

Enjoin Prosecution of Suits..... 56

Praecipe for Record on Appeal..... 78

Stipulation for Continuance..... 53

Supplemental Praecipe as to Record on Appeal. 79

Names and Addresses of Attorneys.

NICHOLAS A. ACKER and DAN HADSELL,
Esqrs., Attorneys for Appellant, Foxcroft Building,
San Francisco, California.

JOHN H. MILLER, Esq., Attorney for Appellee,
Crocker Building, San Francisco, California.

*In the District Court of the United States for the
Northern District of California, Second Division.*

(No. 18—IN EQUITY.)

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant.

Bill of Complaint.

For Infringement of Patent, No. 771,441.

Now comes the Searchlight Horn Company, plaintiff in the above-entitled suit and files this its bill of complaint against Pacific Phonograph Company, defendant, and for cause of action alleges:

1. That the full name of the plaintiff is Searchlight Horn Company, and during all the time of the actual infringement hereinafter complained of said plaintiff was and still is a corporation created under the laws of the State of New York and having its principal place of business at the City of New York in the State of New York.

2. That the full name of the defendant is Pacific

Phonograph Company, and since February 1, A. D. 1909, said defendant has been and still is a corporation created and existing under and by virtue of the laws of the State of California and having its principal place of business at the City and County of San Francisco in the State of California.

3. That the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States. [1*]

4. That heretofore, to wit, on October 4, A. D. 1904, the government of the United States granted, issued and delivered to one Peter C. Nielsen letters patent of the United States for a new and useful invention, to wit, a horn for phonographs and similar machines; that said letters patent bore date October 4, A. D. 1904, and were numbered 771,441, and granted to the said Nielsen and his heirs and assigns the sole and exclusive right to make, use and vend the said invention throughout the United States of America and the territories thereof during the period of seventeen years from said October 4th, A. D. 1904; that a more particular description of the invention patented in and by said letters patent will fully appear from said letters patent which are ready in court to be produced by plaintiff or a duly authenticated copy thereof and of which profert is hereby made.

5. That heretofore, to wit, on January 4th, A. D. 1907, by an assignment in writing plaintiff became and ever since has been and is now the sole owner and holder of said letters patent and all the rights thereby granted.

*Page-number appearing at foot of page of original certified Record.

6. That since January 4th, A. D. 1907, plaintiff has made and sold devices covered and claimed by said letters patent and upon each of said devices has marked the word "Patented" together with the date and number of said letters patent.

7. That heretofore, to wit, on May 9, A. D. 1911, plaintiff herein commenced an action at law in the above-entitled court against Sherman, Clay & Company, a corporation created under the laws of the State of California and doing business in the Northern District of California, and on said [2] last named day filed its declaration whereby it alleged the issuance of the aforesaid letters patent, No. 771,441, to Peter C. Nielsen and the ownership thereof by plaintiff since January 4, A. D. 1907, and that said Sherman, Clay & Company had infringed upon said letters patent whereby plaintiff had been damaged in the sum of Fifty Thousand Dollars and prayed that judgment be rendered against said Sherman, Clay & Company for said damages; that thereafter, to wit, on May 25, A. D. 1911, said Sherman, Clay & Company appeared in said action and filed its answer denying all the allegations in said declaration, and thereafter, to wit, within thirty days before the trial of said action filed a notice in writing under section 4920 of the Revised Statutes of the United States setting up that the said Nielsen was not the first or original or any inventor of the thing patented in and by said letters patent, No. 771,441, but that long prior to the supposed invention thereof by the said Nielsen the thing patented in and by said letters patent, No. 771,441, was shown, described and

patented in and by certain prior letters patent of the United States and of Great Britain which were specified by given numbers, and that long prior to the supposed invention by the said Nielsen the thing patented in and by said letters patent, No. 771,441, had been made, used and sold by and was known to others in this country, and the names of the persons alleged to have had such prior knowledge and use together with the places where the same was used were set up in detail in said notice; that upon the issues so joined the said action at law against Sherman, Clay & Company came on for trial before the above-entitled [3] court and a jury, which said trial commenced on October 1, A. D. 1912, and was concluded on October 4, 1912; that evidence was introduced by both sides, and the case was fully and fairly tried on its merits and after argument by counsel on both sides was submitted to a jury for decision; that thereafter, on October 4, A. D. 1912, said jury returned its verdict in favor of the plaintiff in said action and against Sherman, Clay & Company, the defendant therein, and assessed damages in favor of said plaintiff and against the said defendant at the sum of \$3,578.00; that thereupon a judgment was duly made and entered in favor of the said plaintiff and against the said Sherman, Clay & Company, defendant in said action, for the said sum of \$3,578.00 and costs of suit; that thereafter in due season defendant in said action duly and regularly petitioned said Court for a new trial and after arguments of counsel and due consideration of the matter said Court denied said motion for a new trial; that thereafter the plaintiff in the said suit vol-

untarily remitted from the amount of said damages all of said damages over and above the sum of \$1.00, and the said judgment has never otherwise been changed, altered or modified but is still in full force and effect.

8. That since February 1, A. D. 1909, the defendant herein without the license or consent of plaintiff in the Northern District of California and elsewhere, has sold and is now using and selling horns for phonographs containing and embracing the invention patented in and by the said letters patent, No. 771,441, and thereby has infringed and is now infringing upon said letters patent. [4]

9. That by reason of the infringement aforesaid, the defendant has realized profits and the plaintiff has suffered damages, but the amount of such profits and damages is unknown to plaintiff and can be ascertained only by an accounting.

10. That the plaintiff has requested the defendant to desist from further infringement of said letters patent and to account to plaintiff for the damages suffered by plaintiff and the profits realized by defendant from and by reason of said infringement, but the defendant has failed and refused to comply with said request or any part thereof, and is now extensively selling said infringing horns.

11. That the defendant threatens and intends to continue said infringement during the pendency of this suit and unless restrained therefrom by this court will continue to infringe during the pendency of this suit, whereby plaintiff will suffer great and irreparable injury, for which it has no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiff prays:

First: That upon the filing of this bill a preliminary injunction be granted enjoining and restraining the defendant, its officers, agents, servants and employees, pending the suit and until the further order of the court from making, using or selling, or threatening, or advertising or offering to make, use or sell any horns for phonographs containing the invention patented in and by said letters patent, No. 771,441, and from infringing upon said letters patent in any manner whatever or aiding or abetting or contributing to any such infringement. [5]

Second: That upon the final hearing the defendant, its officers, agents, servants and employees, be permanently and finally enjoined and restrained from making, using or selling any horns for phonographs or other machines containing the invention patented in and by the said letters patent, No. 771,441, and from threatening or advertising or offering to make, use or sell any such horns and from infringing upon said letters patent in any manner whatever, or aiding, abetting or contributing to any such infringement, and that the writ of injunction accordingly be issued out of and under the seal of this court enjoining the defendant, its officers, agents, attorneys, servants and employees as aforesaid.

Third: That it be ordered, adjudged and decreed that the plaintiff have and recover from the defendant the profits realized by the defendant and the damages sustained by the plaintiff from and by reason of the infringement aforesaid, together with costs of suit and such other and further relief as to the

Court may seem proper and in accordance with equity and good conscience.

Fourth: That upon the filing of this bill the writ of subpoena ad respondendum be issued, directed to Pacific Phonograph Company, the defendant herein, commanding it to appear and answer this bill of complaint in accordance with the rules of the Court.

SEARCHLIGHT HORN CO.

By JOHN H. MILLER and
W. K. WHITE,

Solicitors for Plaintiff.

JOHN H. MILLER and
W. K. WHITE,

Of Counsel for Plaintiff,
Crocker Building, San Francisco, Cal.

[6]

United States of America,
Southern District of New York,
County of New York,—ss.

W. H. LOCKE, Jr., being duly sworn, deposes and says that he is the President of Searchlight Horn Company, the complainant in the within entitled action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

W. H. LOCKE, Jr.

Subscribed and sworn to before me this 1st day of May, 1913.

DANIEL J. BEGLEY,
Notary Public #406, New York.
No. 27,903.

State of New York,
County of New York,—ss.

I, WILLIAM F. SCHNEIDER, clerk of the County of New York, and also clerk of the Supreme Court for the said county, the same being a Court of Record, DO HEREBY CERTIFY THAT DANIEL J. BEGLEY, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said county, duly appointed and sworn, and authorized to administer oaths to be used in said court in said State, and for general purposes; that I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe. [7]

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court and county, the 1st day of May, 1913,

[Seal]

WM. F. SCHNEIDER,
Clerk.

[Endorsed]: Filed May 9, 1913, W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

[Answer.]

*In the United States District Court, Northern
District of California, Second Division.*

IN EQUITY—No. —.

U. S. Patent 771,441.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

THE ANSWER OF PACIFIC PHONOGRAPH
COMPANY, DEFENDANT, TO THE BILL
OF COMPLAINT OF SEARCHLIGHT
HORN COMPANY, PLAINTIFF.

To the Honorable, the Judges of the United States
District Court for the Northern District of Cali-
fornia, Second Division.

This defendant in answer to the bill of complaint
herein, or to so much thereof as it is advised it is
material or necessary for it to make answer to, an-
swering, says:

1. This defendant does not know and is not in-
formed, save by said bill of complaint whether or not
the plaintiff during all the time of the alleged acts
of infringement complained of was or still is a corpo-
ration created under the laws of the State of New
York or having its principal place of business at the
City of New York, State of New York, and, therefore,
denies the same and leaves the plaintiff to make such
proof thereof as it may. [9]

2. Defendant admits that its full name is Pacific Phonograph Company and that it has been and still is a corporation created and existing under the laws of the State of California and having its principal place of business at the city and county of San Francisco in the State of California.

3. Defendant does not know, and is not informed, save by said bill of complaint, whether or not on October 4, A. D. 1904, or at any time heretofore the Government of the United States granted, issued or delivered to one Peter C. Nielsen, Letters Patent of the United States for an alleged new and useful invention, to wit: A horn for phonographs and similar machines, and therefore denies the same and leaves the plaintiff to make such proof thereof as it may; and defendant denies that Letters Patent bearing date of October 4, A. D. 1904, and numbered 771,441 granted to said Peter C. Nielsen, his heirs and assigns, the sole or exclusive right to make, use or vend the said alleged invention throughout the United States of America and the territories thereof during the period of seventeen years from said October 4, A. D. 1904, or for any other time.

4. Defendant does not know, and is not informed save by said bill of complaint, whether or not on January 4, A. D. 1904, or at any other time heretofore, by an assignment in writing, or otherwise, plaintiff became or that plaintiff has since been or is now the sole owner or holder of said Letters Patent, or of any rights granted thereby, and defendant, therefore, denies the same and leaves the plaintiff to make such proof thereof as it may.

5. Defendant does not know and is not informed save by said bill of complaint whether or not since said [10] January 4, A. D. 1907, the plaintiff has made or sold devices covered and claimed by said Letters Patent, or that the plaintiff has marked the word "Patented" together with the date and number of said Letters Patent upon any such devices; and it, therefore, denies the same and leaves the plaintiff to make such proof thereof as it may.

6. Defendant does not know and is not informed save by the bill of complaint:

Whether or not on May 9, A. D. 1911, or at any time heretofore, plaintiff commenced an action at law in the above-entitled court against Sherman Clay & Company, a corporation created under the laws of the State of California, and doing business in the Northern District of California, or whether or not on said last named day it filed its declaration whereby it alleged the issuance of the aforesaid Letters Patent No. 771,441 to Peter C. Nielsen and the ownership thereof by the plaintiff since January 4, A. D. 1907, and that said Sherman, Clay & Company had infringed upon said letters patent whereby plaintiff had been damaged in the sum of Fifty Thousand dollars (\$50,000), and prayed that judgment be rendered against said Sherman, Clay & Company for said damages;

Or whether or not on May 25, A. D. 1911, or at any other time said Sherman, Clay & Company appeared in said action and filed its answer denying all the allegations in said declaration;

Or whether or not thereafter and within thirty

days before the trial of said action, said Sherman, Clay & Company filed a notice in writing under Section 4920 of the Revised Statutes of the United States, stating that said Peter C. Nielsen was not the first or original or any inventor of the [11] thing patented in and by said Letters Patent No. 771,441 and that long prior to the supposed invention thereof by said Peter C. Nielsen, the thing patented in and by the said Letters Patent No. 771,441 was shown, described and patented in any by certain prior letters patent of the United States and of Great Britain, specified by given numbers, and that prior to the supposed invention of said Peter C. Nielsen, the thing patented in and by said Letters Patent No. 771,441 had been made, used and sold by, and was known to others in this country; or whether or not the names of such persons alleged to have had such knowledge and use, together with the places where the same was used, were set up in detail in said notice.

Or whether or not upon any issue joined, the said action at law against Sherman, Clay & Company came on for trial before the above-entitled court and a jury, or whether or not evidence was introduced by either side and the case fully and thoroughly tried on its merits, or whether or not after argument by counsel on either side, the case was submitted to the jury for decision.

Or whether or not thereafter on October 4, A. D. 1912, or at any other time said jury returned its verdict in favor of the plaintiff in said action and against said Sherman, Clay & Company, or assessed damages in favor of said plaintiff and against said defendant

or at the sum of three thousand five hundred seventy-eight dollars (\$3,578) ;

Or whether or not a judgment was duly made and entered in favor of said plaintiff and against said Sherman, Clay & Company or for the said sum of three thousand five hundred seventy-eight dollars (\$3,578) or costs of suit ;

Or whether or not plaintiff petitioned said court for a new trial or whether or not said motion was denied ; [12]

Or whether or not thereafter the plaintiff in said suit remitted voluntarily or otherwise from the amount of said damages, all of said damages over and above the sum of One dollar (\$1.00), or whether or not said judgment has never otherwise been changed, altered or modified, or is still in full force and effect.

Defendant therefore denies the averments recited in Section 7 of the bill of complaint and leaves the plaintiff to make such proof thereof as it may.

7. Defendant further answering denies that since February 1, A. D. 1909, or at any other time, it, the defendant herein, without the license or consent of the plaintiff, in the Northern District of California or elsewhere, has used or sold, or is now using or selling horns for phonographs containing or embracing the alleged invention of said Letters Patent No. 771,441, or that it has committed or is now committing any acts of infringement or otherwise in violation of any rights of the plaintiff under and by virtue of said letters patent.

Defendant further denies that it has realized or

is now realizing any profits or that the plaintiff has suffered or is suffering any damages from or due to any act or acts of infringement or otherwise in violation of any rights of the plaintiff under and by virtue of said letters patent.

8. Defendant further denies that the plaintiff has requested it, the defendant, to desist from infringement of said letters patent or to account to the plaintiff for any damages that have been suffered by the plaintiff or profits [13] that have been realized by defendant from and by reason of any infringement of said letters patent; and defendant further denies that it has failed or refused to comply with any such request or with any part thereof, and denies that it has at any time infringed said letters patent; and defendant denies that it is now selling or has ever sold horns in infringement of said Letters Patent No. 771,441.

9. Defendant further denies that it threatens or intends or has threatened or intended to continue during pendency of this suit or at any other time any act or acts of infringement or otherwise in violation of any right of the plaintiff under and by virtue of said letters patent, and denies that the plaintiff has suffered any injury from any act or acts unlawfully committed by defendant.

10. Defendant alleges, on information and belief, that the alleged improvement in horns for phonographs or similar machines described and claimed in said Letters Patent, No. 771,441 was not an invention at the time when it was produced; that there was no new function or mode of operation or result at-

tained thereby; that there was nothing substantially new therein, and that in view of the state of the art at the date of the alleged invention, it did not require the exercise of any inventive faculty to devise and produce the horn for phonographs or similar articles described and claimed in said letters patent, but merely the exercise of mechanical skill, and that at the time of the alleged invention by the said Peter C. Nielsen and his application for said letters patent, the state of the art was such that there was nothing of patentable novelty in the said alleged improvement in horns or similar machines for phonographs or in any part thereof.

11. Defendant alleges that said Peter C. Nielsen [14] failed to apply to the Commissioner of Patents of the United States for said Letters Patent No. 771,441 in manner and form as by statute required and that he failed to prosecute an application for said letters patent under and in conformity with the law in such cases made and provided.

12. Defendant alleges, on information and belief, that while the application for said Letters Patent, No. 771,441 was pending in the United States Patent Office, the applicant for the said patent so limited and confined the claims of said application that the plaintiff cannot now seek for or obtain a construction for such claims, or any of them, sufficiently broad to cover the construction used and sold by the defendant.

13. Defendant further alleges, on information and belief, that said Letters Patent, No 771,441, are invalid and void for the reason that the said Peter C.

Nielsen was not the original, first or sole inventor or discoverer of the alleged improvement therein described and claimed or of any material and substantial part thereof, and that substantially the same horn for phonographs or similar machines, and all the material parts thereof, and everything alleged to be new or of invention in said Letters Patent, No. 771,441, are clearly shown and described in and by certain patents granted or applied for prior to the alleged invention thereof by said Peter C. Nielsen or more than two years prior to his said application for patent therefor, and also in certain printed publications published prior to the alleged invention thereof by the said Peter C. Nielsen, or more than two years prior to his said application for patent therefor; and that said patents and printed publications together with the dates of the grant [15] and publication thereof are as follows:

UNITED STATES LETTERS PATENT.

No. 72,422, dated December 17, 1867, to George S. Saxton.

No. 165,912, dated July 27, 1875, to William H. Barnard.

No. 181,159, dated August 15, 1876, to Charles W. Fallows.

No. 187,589, dated February 20, 1877, to Emil Boesch.

No. 216,188, dated June 3, 1879, to Thomas W. Irwin et al.

No. 240,038, dated April 12, 1881, to Nathaniel C. Powelson, et al.

No. 274,930, dated April 3, 1883, to Isaac P. Frink.

No. 276,251, dated April 24, 1883, to Philip Lesson.

No. 320,424, dated June 16, 1885, to George W.
Woodward.

No. 337,971, dated March 16, 1886, to Henry Mc-
Laughlin.

No. 362,107, dated May 3, 1887, to Charles R. Pen-
field.

No. 406,332, dated July 2, 1889, to James C. Bayles.

No. 409,196, dated August 20, 1889, to Charles L.
Hart.

No. 427,658, dated May 13, 1890, to James C. Bayles.

No. 453,798, dated June 9, 1891, to Augustus Gers-
dorff.

No. 455,910, dated July 14, 1891, to William J.
Gordon.

No. 491,421, dated February 7, 1893, to Augustus
Gersdorff.

No. 534,543, dated February 19, 1895, to Emile Ber-
liner.

No. 578,737, dated March 16, 1897, to Philip J. Haas.

No. 612,639, dated October 18, 1898, to James Clay-
ton.

No. 648,994, dated May 8, 1900, to Major D. Porter.

No. 651,368, dated June 12, 1900, to John Lanz.

No. 692,363, dated February 4, 1902, to Walter C.
Runge.

No. 699,928, dated May 13, 1902, to Charles Mc-
Veety, et al.

No. 705,126, dated July 22, 1902, to George Osten
et al.

No. 738,342, dated September 8, 1903, to Albert S. Marten.

No. 739,954, dated September 29, 1903, to Gustave Harman Villy.

No. 769,410, dated September 6, 1904, to E. A. Schoettel.

No. 770,024, dated September 13, 1904, to Bartolo Ruggiero et al.

No. 763,808, dated June 28, 1904, to Hollister Sturges. [16]

PRINTED PUBLICATIONS.

The Electrical World, published at New York, N. Y., article on "Berliner Gramophone" pp. 255, 256, issue of Nov. 12, 1887, and article on "The Improved Gramophone," p. 80, issue of August 18, 1888.

A paper read before the Franklin Institute, May 16, 1888, on the Gramophone, by Emile Berliner, published in the Journal of the Franklin Institute at Philadelphia, Pa., June, 1888, and by Rufus H. Darby, printer, in 1894, at Washington, D. C., and many other publications describing Scott's Phonautograph of 1857.

UNITED STATES LETTERS PATENT FOR DESIGNS.

No. 8,824, dated December 7, 1875, to Frederick S. Shirley.

No. 10,235, dated September 11, 1877, to Edward Cairns.

No. 34,907, dated August 6, 1901, to McVeety et al.

UNITED STATES REGISTERED TRADE-
MARK.

No. 31,772, registered July 5, 1898, by John Kaiser.

BRITISH LETTERS PATENT.

No. 9,762, dated July 5, 1888, to Charles Adams
Randall.

No. 14,730, dated 1903, to

No. 17,786, dated August 13, 1902, to Henry Fair-
brother.

No. 20,146, dated September 15, 1902, to Gustave
Harman Villy.

No. 20,567, dated September 20, 1902, to John Mesby
Tourtel.

No. 22,273, dated November 5, 1901, to Walter C.
Runge.

No. 22,612, dated November 13, 1899, to George L.
Hogan.

No. 7,594, dated April 24, 1900, to William Phillips
Thompson.

BELGIAN LETTERS PATENT.

No. 157,009, dated June 10, 1901, to Walter C.
Runge. [17]

No. 163,518, dated May 27, 1902, to Walter C.
Runge.

No. 175,354, dated January 29, 1904, to L. Aneion.

No. 175,785, dated March 1, 1904, to A. Combret.

No. 176,179, dated March 19, 1904, to H. Sieger.

FRENCH LETTERS PATENT.

No. 301,583, dated June 23, 1900, to Jose Guerrero.

No. 318,742, dated February 17, 1902, to M. Turpin.

No. 31,470, dated March 25, 1857, to Leon Scott,
and certificate of addition thereto,
dated July 29, 1859.

PRINTED PUBLICATIONS.

The printed copies of the specifications of the aforesaid several letters patent of the United States published by the Patent Office of the United States in the city of Washington, in the District of Columbia on the dates corresponding with the respective dates of said letters patent of the United States and the printed copies of the specifications of the aforesaid British letters patent published by the Patent Office of Great Britain in the city of London, England, on the dates corresponding with the respective dates of printed publication of the complete specifications of the said several British patents, and the printed copies of the specifications of the aforesaid French letters patent published by the Patent Office of France in the city of Paris, France, on the dates corresponding with the respective dates of publication of the specifications of the said several French patents.

14. Defendant further alleges, on information and belief, that the alleged improvements in horn for phonographs and similar machines described and claimed in said Letters Patent No. 771,441, and all material and substantial parts [18] thereof were, prior to the date of the alleged invention thereof by said Peter C. Nielsen or more than two years prior to his said application for patent therefor, invented by, known to, and in public use or on sale by the fol-

lowing named persons and parties at the following named places, to wit:

John Kaiser of New York, N. Y., at New York, N. Y., and elsewhere.

C. A. Senne of New York, N. Y., at New York, N. Y., and elsewhere.

Henry Staude of New York, N. Y., at New York, N. Y., and elsewhere.

Edward A. Merritt of New York N. Y., at New York, N. Y., and elsewhere.

Bettini Phonograph Company of New York, N. Y., at New York, N. Y., and elsewhere.

Edison Manufacturing Company of West Orange, N. J., at West Orange, N. J., New York, N. Y., and elsewhere.

Walcutt, Miller & Co. and Cleveland Walcutt, of New York, N. Y., at New York, N. Y.

Judge Publishing Company of New York, N. Y., at New York, N. Y., and elsewhere.

Harms, Kaiser & Hagen of New York, N. Y., at New York, N. Y., and elsewhere.

Thomas A. Edison of West Orange, N. J., at West Orange, N. J., and elsewhere.

Mrs. Warren of Buffalo, N. Y., at Buffalo, N. Y. and elsewhere.

Louis Atz of New York, N. Y., at New York, N. Y., and West Orange, N. J., and elsewhere.

Peter Bacigalupi, of San Francisco, Cal., at San Francisco, Cal., and elsewhere and I. W. Norcross of San Francisco, Cal., at New York, N. Y., and elsewhere.

Edward A. Schoettel of Brooklyn, N. Y., at Brooklyn, N. Y., New York, N. Y. and elsewhere.

George S. Saxton of St. Louis, Missouri, at said St. Louis, and elsewhere.

William H. Barnard of Sedalia, Missouri, at said Sedalia, and elsewhere.

Charles W. Fallows of Philadelphia, Pennsylvania, at said Philadelphia and elsewhere. [19]

Ellsworth A. Hawthorne, of Bridgeport, Conn., at Philadelphia, Pa. and elsewhere.

Horace Sheble of Philadelphia Pa., at said Philadelphia and elsewhere.

Emil Boesch of San Francisco, California, at said San Francisco and elsewhere.

Thomas W. Irwin of Alleghany, Pennsylvania, at said Allegheny and elsewhere.

George K. Reber of Pittsburg, Pennsylvania, at said Pittsburg and elsewhere.

Nathaniel C. Powelson of Brooklyn, New York, at said Brooklyn, and elsewhere.

Charles Deavs of New York, New York, at said New York and elsewhere.

Isaac P. Frink of New York, New York, at said New York and elsewhere.

Philip Lesson of Newark, New Jersey, at said Newark and elsewhere.

George W. Woodward of Brooklyn, New York, at said Brooklyn and elsewhere.

Henry McLaughlin of Bangor, Maine, at said Bangor and elsewhere.

Charles R. Penfield of Rochester, New York, at said Rochester and elsewhere.

James C. Bayles of New York, New York, at said New York and elsewhere.

Charles L. Hart of Brooklyn, New York, at said Brooklyn and elsewhere.

Augustus Gersdorff of Bridgeton, New Jersey, at said Bridgeton and elsewhere.

William J. Gordon of Philadelphia, Pennsylvania, at said Philadelphia and elsewhere.

Augustus Gersdorff of Washington District of Columbia, at said Washington and elsewhere.

Philip J. Haas of Marengo, Iowa, at said Marengo and elsewhere.

James Clayton of New York, at said New York and elsewhere.

Major D. Porter of New Haven, Connecticut, at said New Haven and elsewhere.

John Lanz of Pittsburg, Pennsylvania, at said Pittsburg and elsewhere.

Charles McVeety of Philadelphia, Pennsylvania, at said Philadelphia and elsewhere.

John F. Ford of Philadelphia, Pennsylvania, at said Philadelphia and elsewhere.

George Osten of Denver, Colorado, at said Denver and elsewhere.

William P. Spalding of Denver, Colorado, at said Denver, and elsewhere. [20]

Bartolo Ruggiero and Gaetano Bongiorrio of Brooklyn, N. Y., at said Brooklyn and elsewhere.

Hollister Sturges of New York, N. Y., at said New York and elsewhere.

Albert S. Martin of East Orange, New Jersey, at

said East Orange and at Newark, N. J., and elsewhere.

Frederick S. Shirley of New Bedford, Massachusetts, at said New Bedford and elsewhere.

Edward Cairns of Morristown, New Jersey, at said Morristown and elsewhere.

Walter H. Miller of Orange, New Jersey, at New York, N. Y., West Orange, N. J., and elsewhere.

Alexander N. Pierman of Newark, New Jersey, at West Orange, New Jersey, and elsewhere.

Edward W. Meeker of Orange, New Jersey, at West West Orange, New Jersey, and elsewhere.

Harvey N. Emmons of East Orange, New Jersey, at West Orange, New Jersey, and elsewhere.

Arthur Collins of New York, New York, at West Orange, New Jersey, and elsewhere.

John Riley of West Orange, New Jersey, at said West Orange, and elsewhere.

James Burns of West Orange, New Jersey, at said West Orange and elsewhere.

Frederick S. Brown of Montclair, New Jersey, at West Orange, New Jersey, and elsewhere.

C. J. Eichhorn of Newark, New Jersey, at said Newark and elsewhere.

Leonard Terhune of Orange, New Jersey, at Newark, New Jersey, and elsewhere.

George C. Magill of Newark, New Jersey, at said Newark and elsewhere.

Peter Schoeppple of Newark, New Jersey, at said Newark and elsewhere.

John H. B. Conger of Newark, New Jersey, at said Newark and elsewhere.

Thomas H. Brady of New Britain, Connecticut, at said New Britain and elsewhere.

August Doig of New Britain, Connecticut, at said New Britain and elsewhere.

William J. Noble of New Britain, Connecticut, at said New Britain and elsewhere.

James Connelly of New Britain, Connecticut, at said New Britain and elsewhere.

Thomas A. Edison, Incorporated (formerly named National Phonograph Company), a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business in West Orange in said State, at said West Orange and elsewhere.

John W. George, of Bridgeport, Conn., at Philadelphia, Pa., and elsewhere. [21]

Tea Tray Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business in Newark in said State, at Newark and elsewhere.

Noble & Brady of New Britain, Connecticut, at said New Britain and elsewhere.

New Jersey Phonograph Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and having its principal place of business in Newark in said State, at said Newark and elsewhere.

North American Phonograph Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey and hav-

ing its principal place of business in Jersey City in said State, at said Jersey City and elsewhere.

15. Defendant further says that it has been diligent in ascertaining and setting forth herein instances of prior knowledge, invention, public use, publication and patenting of the invention set forth and claimed in said letters patent No. 771,441, yet believes many further instances exist and prays leave to add the same when ascertained.

16. Defendant alleges that for the purpose of deceiving the public, the description and specification of the alleged invention filed by the said Nielsen in the Patent Office was made to contain less than the whole truth relative to his alleged invention or discovery, and that the description of the alleged invention in the specification is not in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it appertains to make, construct and use the same.

17. Defendant further alleges, on information and belief, that said letters patent No. 771,441 are invalid and [22] void because the alleged invention attempted to be patented thereby was at the time it was produced and is now without utility.

18. Defendant further avers and states that the claims as issued in said letters patent No. 771,441 are not distinct, in that they do not particularly point out and distinctly claim the part, improvement, or combination which the said alleged inventor claims as his invention or discovery.

19. Defendant further alleges, on information and belief, that said letters patent No. 771,441 are

invalid and void because the alleged invention attempted to be patented thereby had been abandoned to the public prior to the date of the application for said letters patent.

And now, this defendant having answered all and singular those portions of the bill of complaint that it is material and necessary to answer, denies all and all manner of things in the said bill alleged which are not hereinbefore specifically answered unto; and it prays to be hence [23] dismissed with its reasonable costs and charges herein most wrongfully sustained.

PACIFIC PHONOGRAPH COMPANY.

By A. R. POMMER,

President.

H. C. SCHAERTZER and

D. HADSELL,

Solicitors for Defendant.

LOUIS HICKS,

Of Counsel for Defendant.

State of California,

City and County of San Francisco,—ss.

A. R. POMMER, being duly sworn, deposes and says: That he is the president of Pacific Phonograph Company, a corporation organized and existing under the laws of the State of California, defendant in the above-entitled suit; that he has read the foregoing answer and knows the contents thereof and that the same is true to his knowledge, except as to the matters which are therein stated to be alleged on information and belief and that as to those mat-

28 *Pacific Phonograph Company vs.*
ters he believes it to be true.

A. R. POMMER.

Sworn and subscribed to before me this 20th day
of May, 1913.

[Seal] J. D. BROWN,
Notary Public, County of San Francisco, State of
California. [24]

Copy of the within answer received May 29th,
1913.

MILLER & WHITE,
Attys. for Plff.

[Endorsed]: Filed May 29, 1913. W. B. Maling,
Clerk. By T. A. Schaertzer, Deputy Clerk. [25]

*District Court of the United States, Northern Dis-
trict of California, Second Division.*

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant.

Amended Answer.

Defendant by leave of Court hereby amends its
answer herein, as follows:

I.

By adding the following letters patent and pub-
lications to those set forth in paragraph 13 of its
answer herein:

UNITED STATES LETTERS PATENT.

No. 632,015 patented Aug. 29, 1899, to Geo. L. Hogan.

No. 647,147 patented April 10, 1900, to F. Myers.

No. 725,815 patented April 21, 1903, to W. Barnes.

No. 748,969 patented Jan. 5, 1904, to C. Melville.

No. 770,024 patented Sept. 13, 1904, to B. Ruggiero et al.

LETTERS PATENT OF GREAT BRITAIN.

No. 9727 of 1901 to W. C. Runge.

No. 5186 of 1903 to F. C. Cockman.

No. 14730 of 1903 to J. M. Tourtel.

LETTERS PATENT OF FRANCE.

No. 321,507 of May 28, 1902, to W. C. Runge.

No. 331,566 of April 28, 1903, to W. T. P. Hollingsworth.

PUBLICATIONS.

“The Theory of Sound in Its Relation to Music,” pp. 156–158, published in New York in 1876 by D. Appleton & Co.

The Phonographische Zeitschrift, Pages 275, 276, 286, 287, published in Berlin, Germany, May 20, 1903. [26]

The Edison Phonograph Monthly, article on Megaphorn, published in New York, N. Y., in June, 1903.

II.

By adding the following names and addresses to those set forth in paragraph 14 of its answer herein:

Peter E. Petersen of New York, N. Y., at New York, N. Y., and elsewhere.

C. D. Emerson of New York, N. Y., at New York, N. Y., and elsewhere.

Hawthorne & Sheble of Philadelphia, Pa., at Philadelphia, Pa., and elsewhere.

Hawthorne & Sheble Mfg. Co., of Philadelphia, Pa., at Philadelphia, Pa., and elsewhere.

American Graphophone Co., Columbia Phonograph Co., William Edwin Parker, Eugene Henry Byrnes, and McDonald, of Bridgeport, Conn., at Bridgeport, Conn., New York, N. Y., and elsewhere.

Paul Kohler, Duffy & Clark, John King, John King, Jr., Robert Seigfried, Christopher Coulter, Mr. Keely and others of Pittsburg, Pa., at Pittsburg, Pa., and elsewhere.

D. HADSELL,

Solicitor for Defendant.

LOUIS HICKS,

Of Counsel for Defendant. [27]

State of California,

City and County of San Francisco,—ss.

A. R. Pommer, being duly sworn, deposes and says: That he is the president of the Pacific Phonograph Company, a corporation, organized and existing under and by virtue of the laws of the State of California, defendant in the above-entitled suit; that he has read the foregoing amended answer and knows the contents thereof and that the same is true of his knowledge, except as to the matters therein stated *on* to be alleged on information and belief and as to those matters he believes the same to be true.

A. R. POMMER.

Subscribed and sworn to before me this 4th day of December, A. D. 1913.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California.

Service of the within Amendment by copy is hereby admitted this 5th day of Dec. 1913.

MILLER & WHITE,

Attorneys for Plff.

[Endorsed]: Filed December 5, 1913. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[28]

In the District Court of the United States, for the Northern District of California, Second Division.

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

**Defendant's Petition to Enjoin Prosecution of Suits
for Infringement.**

To the Honorable, the Judges of the Above-entitled Court:

Comes now the above-named defendant and gives this Honorable Court to understand and be informed:

I.

That the above-entitled suit is for the infringe-

ment of United States Letters Patent No. 771,441, particularly claims 2 and 3 thereof, by defendant—Pacific Phonograph Company, who is a dealer in musical instruments and musical supplies generally, for Phonographic Horns which the said defendant as a dealer purchased from the said Thomas A. Edison, Inc., for use in connection with talking machines sold by musical dealers generally.

II.

That the present suit was filed in this court on or about the 9th day of May, 1913, and a preliminary injunction prayed for, which injunction was granted on the 24th day of June, 1913. That an appeal was duly taken to the United States *Circuit of Appeals* for the Ninth Circuit from the order of this court granting the said preliminary injunction, which appeal was argued [29] before the said Court of Appeals and submitted to said court. That on the 4th day of May, 1914, the said Court of Appeals rendered its decision affirming the decree of this court in the granting of the said preliminary injunction.

III.

That immediately after the rendition of the said decision by the said Circuit Court of Appeals relative to said above-mentioned appeal, the plaintiff herein, the Searchlight Horn Company commenced an action in Equity Suit No. 575, in the District Court of the United States for the District of New Jersey, against the Thomas A. Edison, Inc., for infringement of the said United States Letters Patent No. 771,441, in suit herein, charging in and by its bill of complaint that the said Thomas A. Edison, Inc.,

had infringed the said letters patent, and more particularly claims two and three thereof, by the said of phonographic horns of the same kind and identical with those supplied by the said Thomas A. Edison, Inc., to the said defendant herein, Pacific Phonograph Company, and complained of as being an infringement of the letters patent in suit herein.

IV.

That in and by the bill of complaint filed in said Equity Suit No. 575, now pending in the said District Court of the United States for the District of New Jersey, prayer was made that the defendant to said action, the said Thomas A. Edison, Inc., be decreed to account for and pay over unto the plaintiff thereto, Searchlight Horn Company, all the gains and profits realized by the said defendant by reason of said alleged infringement of said letters patent No. 771,441.

V.

That the defendant, Thomas A. Edison, Inc., duly filed [30] its answer to the bill of complaint, *re* Equity Suit No. 575, and the said suit has been at issue ever since.

VI.

That in connection with said suit No. 575, the defendant thereto, the Thomas A. Edison, Inc., has taken its testimony under stipulation herein that the testimony taken by the defendant to the present suit may be used on behalf of the said defendant to Equity Suit No. 575, now pending in the District Court of the United States for the District of New

Jersey, and the said Equity Suit No. 575 is now ready for hearing.

VII.

That your petitioner, the defendant herein, Pacific Phonograph Company, is one of the many hundred of dealers of the Thomas A. Edison, Inc., located and doing business throughout the territory of the United States of America, and shows unto your Honors that all of the phonographic horns complained of herein as infringement of the said letters patent in suit herein are phonographic horns purchased by the said defendant, Pacific Phonograph Company from the said Thomas A. Edison, Inc., defendant to said Equity Suit No. 575.

VIII.

That your petitioner, defendant herein, Pacific Phonograph Company, is not engaged at this time and has not been for a long time past engaged in the selling of the said alleged infringing phonographic horns.

IX.

That in addition to the present suit pending against the defendant herein, one of the dealers of the Thomas A. Edison, Inc., there is now pending in this court, Equity Suit No. 7, [31] brought by the plaintiff herein against Babson Brothers, Inc., another dealer of the said Thomas A. Edison, Inc., said suit alleging infringement by said Babson Brothers, Inc., of the letters patent in suit herein for the same identical horns herein complained, and the same identical horns sold by the said Thomas A. Edison, Inc., and alleged in said pending Equity Suit No. 575,

to be an infringement of the letters patent herein.

X.

That the said plaintiff, Searchlight Horn Company, has threatened and still threatens and continues to threaten to bring many other similar suits against dealers of the Thomas A. Edison, Inc., defendant to said pending action No. 575, and that unless restrained by this Honorable Court, will bring such suits and will prosecute the same, and will continue to prosecute the suits heretofore brought against said dealers.

XI.

That the said defendant to pending Equity Suit No. 575, Thomas A. Edison, Inc., is financially able to respond on an accounting to any judgment which may be rendered against it in connection with said pending suit No. 575, and whereas all of the phonographic horns complained of in the present case and equally so in the pending case against Babson Brothers, Inc., are phonographic horns sold by the said Thomas A. Edison, Inc.; they are each and all of them subject to said accounting on any judgment which may be obtained in said pending Equity Suit No. 575, and are all subject to any such accounting and must be accounted for by the said Thomas A. Edison, Inc., in said suit No. 575.

XII.

That the defendant herein is not a manufacturer of [32] the phonographic horns herein complained of as an infringement of said letters patent in suit herein, but on the contrary, is merely one of the many dealers of the Thomas A. Edison, Inc., and procured

from said company, each and all of the phonographic horns herein complained of.

XIII.

That your petitioner, Pacific Phonograph Company shows unto your Honors that the plaintiff herein, Searchlight Horn Company, is not at this time engaged in the manufacture and sale of the phonographic horns covered by the letters patent in suit herein and has not been so engaged since the month of May, 1908.

XIV.

That your petitioner, Pacific Phonograph Company, shows unto your Honors that the plaintiff herein, the Searchlight Horn Company, when engaged in business prior to the month of May, 1908, manufactured and sold its patented phonographic horns to dealers throughout the United States, and was not a user of the same, but that said plaintiff derived its profit, whatever the same may have been, from its patented phonographic horns, solely by the manufacture and the unconditional sale thereof direct to the dealers engaged throughout the United States in the handling of said goods, and that upon the satisfaction by the said Thomas A. Edison, Inc., of any judgment which may be rendered upon an accounting obtained in connection with said Equity Suit No. 575 now pending in the District Court of the United States for the District of New Jersey, the infringing phonographic horns sold by said Thomas A. Edison, Inc., to its numerous dealers throughout the United States will be released from the patent monopoly, and the defendant herein and

other alleged infringing dealers of the said [33] Thomas A. Edison, Inc., in this circuit and elsewhere throughout the United States, will not be liable to the Searchlight Horn Company, plaintiff herein.

XV.

That if the said Searchlight Horn Company be not restrained by this court from continuing the prosecution of the present suit, and from bringing other suits of a like nature against dealers in this circuit of the said Thomas A. Edison, Inc., irreparable injury and damage will result, by the loss to the said Thomas A. Edison, Inc., of its dealers, who, on account of the harassment, annoyance and expense occasioned by the acts of the said Searchlight Horn Company, will fall away from the said Thomas A. Edison, Inc., and will cease to patronize the said company in the purchase of any and all machinery and accessories of every kind and nature incident to the talking machine business, and outside of and wholly foreign to the phonographic horns in question herein, for your petitioner shows unto your Honors that the said Thomas A. Edison, Inc., is a manufacturer and seller of talking machines and accessories thereto and manufacturers and sells many machines and apparatus in this line which have nothing to do with and are wholly foreign to the phonographic horns of the alleged letters patent in suit herein.

XVI.

That your petitioner, Pacific Phonograph Company, shows to your honors that the purpose of the said Searchlight Horn Company in the acts and course which it is pursuing and threatens to pursue,

is to harass and annoy dealers of the Thomas A. Edison, Inc., and to harass and annoy the said Thomas A. Edison, Inc., and to put the said company, and equally so your petitioner and dealers generally [34] of the said Thomas A. Edison, Inc., to needless expense by being called upon to defend a multiplicity of suits for alleged infringement of the letters patent in suit herein.

Inasmuch, therefore, as your petitioner is without any remedy, except in a court of equity, your petitioner prays for an order enjoining the said Searchlight Horn Company, the plaintiff herein, from further prosecuting the said suit above named, and from bringing any more suits of a like nature against dealers in phonographic horns supplied by the Thomas A. Edison, Inc., for the infringement of said patent in suit herein, and sold to them by the said Thomas A. Edison, Inc., said injunction order to be continued until rendition of the judgment of the said District Court of the United States for the District of New Jersey, and upon the Master's report on an accounting of any such judgment as may be obtained by the plaintiff, Searchlight Horn Company, in connection with said Equity Suit No. 575, now pending in said District Court of the United States for the District of New Jersey, and your petitioner further prays that your Honors issue a restraining order against the said Searchlight Horn Company in the aforesaid matters until this petition is, upon proper motion herewith accompanying, heard and determined by your Honors.

And your petitioner will ever pray.

PACIFIC PHONOGRAPHIC CO.

By N. A. ACKER and

D. HADSELL,

Solicitors and Counsel for Defendant.

City and County of San Francisco,

State of California,—ss.

A. R. POMMER, being duly sworn, on oath says:

[35]

That he is the President of the Pacific Phonograph Company named in the foregoing petition to enjoin prosecution of suits for infringement; that he has read the petition and knows the contents thereof, and that the same is true of his own knowledge.

A. R. POMMER.

Subscribed and sworn to before me this 17th day of August, 1914.

[Seal]

LESTER G. BURNETT,

Notary Public in and for the city and county of San Francisco, State of California.

Due service and receipt of a copy of the within Pêtition is hereby admitted this 17 day of August, 1914.

MILLER & WHITE,

Attys. for Plff.

[Endorsed]: Filed August 17, 1914. Walter B. Maling, Clerk. [36]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Notice of Motion.

To Searchlight Horn Company and Messrs. Miller
& White (Its Attorneys), Crocker Building,
San Francisco, California:

Gentlemen:

You will please take notice that on Monday, the 24th day of August, 1914, at 10 o'clock in the morning or as soon thereafter as counsel can be heard, defendant will move this Court at the courtroom thereof, in the city and county of San Francisco, State of California, for an order enjoining you, the said Searchlight Horn Company, from the further prosecution of the above-entitled infringement suit brought against this defendant—Pacific Phonograph Company, and from bringing or instituting within the jurisdiction of this court any other suit or suits of a similar nature for infringement against dealers of Thomas A. Edison, Incorporated, from whom the alleged infringing Phonographic Horns were purchased, and against which said Thomas A. Edison, Incorporated, there is now pending in the

District Court of the United States for the District of New Jersey, Equity Suit No. 575, brought by the plaintiff herein—Searchlight Horn Company against the said Thomas A. Edison, Incorporated, for infringement of United States [37] Letters Patent, 771,441, the said letters patent being the same as the letters patent involved in the present suit, and alleged to have been infringed by the defendant herein; the injunctive order herein asked for to continue and remain in full force and effect until accounting is had on any judgment which may be obtained against the Thomas A. Edison, Incorporated, in the above-mentioned Equity Suit No. 575 now pending in the District Court of the United States for the District of New Jersey.

Said motion is based, and we will reply at the hearing thereon, upon the records and proceedings in this case, the affidavit of A. R. POMMER, D. HADSELL and the records of this court in that certain action at law No. 15,326, entitled “Searchlight Horn Company vs. Sherman Clay & Company,” and defendant’s petition for an order enjoining the prosecution of this suit for infringement—all of which are served herewith.

PACIFIC PHONOGRAPH COMPANY.

By N. A. ACKER and

D. HADSELL.

San Francisco, California, August 17th, 1914.

*In the District Court of the United States, for the
Northern District of California, Second Division.*

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Affidavit of A. R. Pommer.

City and County of San Francisco,
State of California,—ss.

A. R. Pommer, of the city and county of San Francisco, State of California, being first duly sworn, deposes and says:

That during all of the times hereinafter mentioned he was and still is the president of the above-named defendant corporation, Pacific Phonograph Company, and as such has full access to the books of the said company; that as the president he has sole charge of the Talking Machine Department of the business of the said defendant corporation; that he was at all times heretofore and is now familiar with all the business of said defendant corporation connected with said Talking Machine Department; that the said Pacific Phonograph Company is the defendant to the above Equity Suit No. 18, filed in this court on the 9th day of May, 1913, by the Searchlight Horn Company for infringement by the said Pacific

Phonograph Company of United States Letters Patent 771,441 involved herein by the sale of phonographic horns; that a preliminary injunction was granted by this court in the present case on the 24th day of June, 1913, from the granting of which injunction [39] order, an appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit, and said Court rendered its opinion on the 4th day of May, 1914, affirming the order of this Court in granting the said preliminary injunction; that since the rendition of the said decision of the said United States Circuit Court of Appeals, the defendant herein has not sold nor offered for sale any of the phonographic horns alleged in the bill of complaint herein to be an infringement of plaintiff's letters patent No. 771,441; that all of the phonographic horns complained of herein as being infringement of said United States Letters Patent No. 771,441, are phonographic horns purchased by the defendant herein from the Thomas A. Edison, Inc., a corporation located and doing business at Orange, New Jersey, which said company has been marketing, selling and offering for sale said phonographic horns complained of herein to dealers generally throughout the United States since the year 1905, and has largely distributed the said horns throughout the United States to a large number of dealers handling such class of goods; that said sale by the Thomas A. Edison, Inc., of the phonographic horns herein complained of was well known to the plaintiff herein, the Searchlight Horn Company; that the plaintiff herein, Searchlight Horn Company, was not

at the time of the commencement of this suit and is not at this time, as affiant is informed and believes, engaged in the manufacture and sale to dealers of the phonographic horns of the letters patent in suit herein, and the said Searchlight Horn Company has not been so engaged in the manufacture and sale of said patented phonographic horns since about the month of May, 1908.

Affiant further says that since the commencement of the present suit and immediately after the rendition of the said decision [40] of the United States Circuit Court of Appeals affirming the decision of this court in the granting of the before mentioned preliminary injunction in this case, the plaintiff herein, Searchlight Horn Company, instituted and commenced in the District Court of the United States for the District of New Jersey, Equity Suit No. 575, to which suit the before mentioned Thomas A. Edison, Inc., is made the party defendant; that in said mentioned Equity Suit No. 575 the plaintiff herein and to said suit charged infringement by the said Thomas A. Edison, Inc., of the United States letters patent in suit herein by the sale of the phonographic horns complained of in the present suit as being an infringement of the said letters patent in suit; that answer was filed by defendant to said Equity Suit No. 575 on or about June 27th, 1914, and ever since said case has been at issue; that in said Equity Suit No. 575, a large amount of testimony has been taken, amounting to more than six hundred pages, and affiant is informed that under a stipulation in the present case, that the testimony taken herein and which

at this time has been taken by defendant herein, shall and may be used as testimony in the defense of said Equity Suit No. 575, and that said Equity Suit No. 575 is now ready for hearing so far as relates to the defendant thereto;

Affiant further states that the complainant herein, Searchlight Horn Company, when engaged prior to the month of May, 1908, in the manufacture of the said phonographic horn of the letters patent in suit herein, derived its revenue, whatever the same may have been, by the unconditional sale of the said patented phonographic horns so manufactured, through the usual channels of trade to dealers throughout the United States engaged in the handling of phonographic horns for use in connection with talking machines; [41]

Affiant further says that in and by its bill of complaint filed in said Equity Suit No. 575 now pending and ready for hearing in the District Court of the United States for the District of New Jersey, the plaintiff herein, and plaintiff to said suit against the Thomas A. Edison, Inc., asked and prayed that the said Thomas A. Edison, Inc., be restrained and enjoined from infringing the letters patent in suit therein which are the letters patent herein involved, and be decreed to account for and pay over unto the Searchlight Horn Company the gains and profits realized by the Thomas A. Edison, Inc., and in addition thereto, the damages sustained by the said Searchlight Horn Company by reason of the alleged infringement of said letters patent, together with cost of suit.

Affiant further says that the said Thomas A. Edison, Inc., defendant to said Equity Suit No. 575, is financially able to respond to any judgment which may be rendered against it on an accounting had and obtained by the plaintiff, Searchlight Horn Company in said pending Equity Suit No. 575, and that whereas all the phonographic horns complained of in the present suit are horns supplied by the said Thomas A. Edison, Inc., to the said Pacific Phonograph Company, a dealer thereof, they are each and all subject to any accounting which may be had in said Equity Suit No. 575, and must be accounted for in said case.

Affiant further states that the Thomas A. Edison, Inc., is willing and well able to respond unto the plaintiff, Searchlight Horn Company, to all and any sums which the Master may find due unto the said plaintiff, on an accounting on any judgment in said Equity Suit No. 575 rendered against the Thomas A. Edison, Inc., in connection with each and all of said alleged infringing phonographic horns. [42]

Affiant further states that in addition to the present equity suit brought by plaintiff, Searchlight Horn Company against the defendant herein, dealer of the Thomas A. Edison, Inc., the plaintiff hereto has pending in this court, a further suit against Babson Brothers, Inc., a dealer of the Thomas A. Edison, Inc., for infringement of the letters patent herein, by the sale of the same identical type of phonographic horns herein complained of, and which horns involved in said mentioned suit are horns supplied to the said Babson Brothers, Inc., by the said

Thomas A. Edison, Inc.

Affiant further states that all of the phonographic horns referred to in the various suits before mentioned are horns supplied to the defendants thereto as dealers by the said Thomas A. Edison, Inc.

Affiant further says that to permit the suits herein to be continued and prosecuted at this time against dealers of the Thomas A. Edison, Inc., will create a needless and heavy expense to the various defendants, and to this defendant, which expense is needless at this time, inasmuch as the entire matter can be settled and adjusted before the Master on an accounting from any judgment which may be obtained against the Thomas A. Edison, Inc., defendant to said pending Equity Suit No. 575, and that such an accounting will dispose of the entire matter in so far as the same relates to the dealers of the Thomas A. Edison, Inc., and give unto the plaintiff herein all that it is justly entitled to for each and every of the alleged infringing phonographic horns supplied by the said Thomas A. Edison, Inc., to its various dealers located throughout the United States, and for each and every of the alleged infringing phonographic horns sold by this defendant, Pacific Phonograph Company. [43]

That plaintiff herein receives no revenue from the patented phonographic horns of the patent in suit by way of royalties under any license agreement entered into prior to the commencement of any of the suits herein mentioned, or the granting of licenses for the use of the said patented phonographic horns; the entire profit made by the plaintiff herein when

engaged in the manufacture of said patented article being, as above stated, derived by the manufacture and outright sale of the said horns to musical dealers throughout the United States handling such class of goods.

Further affiant saith not.

A. R. POMMER.

Subscribed and sworn to before me this 17th day of August, 1914.

[Seal] LESTER G. BURNETT,
Notary Public in and for the City and County of San
Francisco, State of California. [44]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

IN EQUITY.—No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Affidavit of D. Hadsell.

State of California,

City and County of San Francisco,—ss.

D. HADSELL, being duly sworn, deposes and says:

That he is a resident of the City of Berkeley, County of Alameda, State of California and is en-

gaged in the City and County of San Francisco, in the practice of law;

That since the commencement of the present suit and up to June 10, 1913, the defense of the present action was under the control of Henry C. Schaertzer, Esq., who died on the 19th day of July, 1913; that since the 19th day of July, 1913, affiant has acted as local counsel relative to the said suit, his services being merely for the purpose of serving and accepting papers in connection with the said suit and advising with the eastern attorney having charge thereof, relative to the condition of the case as pending in this court; that heretofore, the case has been under the control, charge and supervision of one Louis Hicks, Esq., of New York City;

That the appeal to the Circuit Court of Appeals of the Ninth Circuit from the granting of the preliminary injunction [45] of this case was argued by the said Louis Hicks and shortly thereafter, to wit, about the month of March, 1914, the said Louis Hicks died in the city of New York; that affiant was not advised until a communication, dated June 18th, 1914, that other counsel had taken sole charge of the present litigation; affiant being informed by said communication that the firm of Gifford & Bull, 141 Broadway, had been retained to take charge as general counsel of the cases pending in this circuit against the vendees of the Thomas A. Edison, Inc.;

That affiant is not familiar with the practice of the patent law and at no time during his connection with the present case, has he deemed himself qualified to present the merits of the defendants to this

action, but, in this connection, has relied solely upon the eastern attorneys having charge of the action, and under whose supervision he has rendered his services;

That after the calling of the present term calendar, the eastern counsel were notified that the case had been set down for hearing on the 25th day of the present month, said term calendar having been called on the 10th day of the present month; that late in the afternoon of Wednesday, the 12th day of August, 1914, affiant received a telegram from Messrs. Gifford & Bull, General Counsel having charge of the pending suit, instructing affiant to consult with N. A. Acker of San Francisco relative to the present suit and the condition thereof in this court, for the purpose of ascertaining what was necessary to be done; that as soon as practical after the receipt of said telegram, affiant communicated with Mr. Acker and arranged for a consultation in order to ascertain what had been done in connection with the pending case of the complainant herein against Sherman, Clay & Company, affiant knowing [46] that the case of Searchlight Horn Company against Sherman, Clay & Company had been set down for hearing on the same day as that of the present suit, and was to be heard in advance thereof;

He was advised by Mr. Acker that a telegram had been received by him from Messrs. Gifford & Bull, asking him to prepare a motion for presentation of the same kind and character as that which had been presented in connection with the case of Searchlight Horn Company vs. Sherman, Clay & Company,

which motion, affiant was advised, was for a petition to restrain the prosecution of the suit against Sherman, Clay & Company pending the determination of a suit pending in the eastern circuit against the Victor Talking Machine Company, of which company, the Sherman, Clay & Company was a vendee; that to affiant's knowledge, the defendant to the present action, the Pacific Phonograph Co. is a vendee of the Thomas A. Edison, Inc., and that horns heretofore offered for sale by the said Pacific Phonograph Company, are horns which it secured as a dealer from the said Thomas A. Edison, Inc.

Affiant is informed and states the fact to be that there is now pending in the United States District Court for the District of New Jersey, Equity Suit No. 575, entitled Searchlight Horn Company vs. Thomas A. Edison, Inc., and that the testimony heretofore taken on behalf of the defendant and the testimony in said cause, now being taken in the east is to be used as testimony not only in the present cases, but in the action now pending in the District Court of the United States for the District of New Jersey;

That the equity suit now pending against the said Thomas A. Edison, Inc., in the District Court of the United States for the District of New Jersey is as far advanced for presentation to the [47] Court as the present case now pending in this court, and at the conclusion of the testimony now being taken, the said suit pending in the District Court of the United States for the District of New Jersey is ready to be

set for hearing at the will of the complainant of said action;

Affiant further states he believed and had every reason to believe that additional testimony was necessary and was being taken in connection with the said pending suit, and that when requested by the counsel for the complainant herein to stipulate that the case might be restored to the present term calendar, he was under the impression that said attorneys and the general attorneys for the defendant herein had completed the taking of all testimony and arranged between themselves that the case was in condition for trial, and that had he had knowledge that the testimony had not been completed, he would not have signed such stipulation, and that on the calling of the calendar, would have objected to the case being set down for hearing on the grounds that the testimony had not been completed.

Affiant further states that since the setting of this cause for trial he has been informed and he therefore believes and alleges the fact to be that the plaintiff herein commenced to take rebuttal testimony in this cause in the City of Pittsburg, Pa., on August 14, 1914, and from there will adjourn to Cleveland, Ohio, to take further rebuttal testimony, and from there will adjourn to Warren City, Ohio, to complete the taking of said testimony; that it will be impossible to complete the taking of said testimony and have the same transcribed and delivered to the clerk of this court until after August 25th, 1914.

D. HADSELL. [48]

Subscribed and sworn to before me this 17 day of August, 1914.

[Seal] LESTER G. BURNETT,
Notary Public in and for the City and County of San
Francisco, State of California.

Due service and receipt of a copy of the within Notice of Motion is hereby admitted this 17 day of August, 1914.

MILLER & WHITE,
Attys. for Plff.

[Endorsed]: Filed August 17, 1914. Walter B. Maling, Clerk. [49]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

IN EQUITY.—No. 18.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH CO.,
Defendant.

Stipulation for Continuance.

It is hereby stipulated and agreed by and between the parties to the above-entitled suit that the trial of the said case which has heretofore been set for August 25, 1914, be postponed until the November, 1914 term of said court, and that at said November, 1914 term the case shall be tried without further ob-

jection from defendant or any further motion for a continuance.

And in consideration of the making of the above stipulation on the part of the plaintiff's attorney, it is stipulated and agreed that the defendant in the case of Searchlight Horn Co. vs. Thomas A. Edison, Inc., No. 575, in the District Court of the United States for the District of New Jersey, shall not without the written consent of the plaintiff's attorney bring that case on for final hearing or take any step in that direction prior to the final hearing of the above-entitled case at the time provided for in the above stipulation.

MILLER & WHITE,

Attorneys and Counsel for Plaintiff in Both Said Cases.

J. D. BULL,

DAN HADSELL,

N. A. ACKER,

Attorneys and Counsel for Defendant in both Said Cases.

Dated August 19, 1914.

[Endorsed]: Filed August 24, 1914. Walter B. Maling, Clerk. [50]

At a stated term, to wit, the July term A. D. 1914 of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Monday, the 24th day of August, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

EQUITY 18.

SEARCHLIGHT HORN CO.

vs.

PACIFIC PHONOGRAPH CO.

**Order Denying Petition to Enjoin the Prosecution
of Suit.**

Defendant's petition to enjoin the prosecution of this suit, being submitted without arguments, it was ordered that said petition be and the same is hereby denied. [51]

*In the District Court of the United States, for the
Northern District of California, Second Division.*

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

**Plaintiff's Answer to Defendant's Petition to
Enjoin Prosecution of Suits.**

Now comes plaintiff in the above-entitled suit and for answer to the defendant's petition to enjoin the prosecution of suits for infringement heretofore filed in this case, denies, admits and avers as follows:

1. Answering paragraph I of said petition wherein it is alleged that the defendant is a dealer in musical supplies generally for phonographic horns purchased from Thomas A. Edison, Inc., for use in connection with talking machines sold by musical dealers generally, this plaintiff avers that said paragraph I is ambiguous and deceptive, and does not state the real facts of the case, but that the real facts are that the defendant is the Pacific Coast distributing agent of Thomas A. Edison, Inc., for its phonographs and phonographic horns, and is engaged in selling the same to the various dealers throughout the Pacific Coast and those dealers in turn sell the same for use to the ultimate consumer or user. While it is true that the defendant may have heretofore sold some of the infringing horns at retail for use by the purchaser and in that sense may be called a dealer, yet the fact is that the defendant is the general distributing agent of Thomas A. [52] Edison, Inc., on the Pacific Coast engaged in supplying infringing horns to the dealers on the Pacific Coast generally, that is to say, various and numerous dealers on the Pacific Coast do not and cannot purchase the horns directly from

Thomas A. Edison, Inc., but are required to and do purchase the same from the defendant herein which defendant is the sole distributing agent of Thomas A. Edison, Inc., on the Pacific Coast for the Edison goods including phonographic horns, and in this respect and to this extent the present suit is in substance and effect a suit against Thomas A. Edison, Inc., although in name it is against the distributing agent of Thomas A. Edison, Inc., and has always been and is now being defended by Thomas A. Edison, Inc., without cost to defendant.

2. Plaintiff admits the allegations contained in paragraph II of said petition, and adds thereto the statement that in respect of the proceedings therein referred to and which were taken by and in the name of the defendant, the fact is that said proceedings were all taken by and at the expense of Thomas A. Edison, Inc., though in the name of the defendant.

3. And answering paragraph III of said petition, plaintiff denies that immediately after or after the rendition of the decision by the Circuit Court of Appeals from the order granting a preliminary injunction in this suit, plaintiff herein commenced an action in equity in the District Court of the United States for the District of New Jersey against Thomas A. Edison, Inc., for infringement of the patent in suit, charging that said Thomas A. Edison, Inc., had infringed upon claims 2 and 3 of said patent by the sale of phonographic horns of the same kind and identical with those supplied by Thomas A. Edison, Inc., to the defendant herein; but in that

behalf plaintiff admits, and avers that prior to the [53] decision of the Court of Appeals aforesaid and on or about February 15th, 1914, this plaintiff did commence such a suit against Thomas A. Edison, Inc., in the District Court of the United States for the District of New Jersey, and that in said suit plaintiff prayed that said Thomas A. Edison, Inc., be required to account for and pay over to the plaintiff all of the gains and profits realized by Thomas A. Edison, Inc., from the said infringement, and admits that Thomas A. Edison, Inc., filed its answer to said bill, the same having been filed about June 30, 1914, and that said suit has been at issue ever since, but denies that under a stipulation made it has been agreed that the testimony taken by the defendant herein may be used on behalf of the defendant in the New Jersey case without being retaken. But in this behalf and in respect to said New Jersey suit, plaintiff avers that the same was filed at the time stated as a matter of precaution to prevent further running of the statute of limitations against Thomas A. Edison, Inc., and the same has not heretofore been more vigorously pressed for trial because the present case against the Pacific Phonograph Company has always been deemed and taken as a test case, and inasmuch as the same has always been and is being now defended by Thomas A. Edison, Inc., it was deemed the better policy by plaintiff to press the same to a final hearing before taking up the New Jersey case. The present suit was commenced on or about May 9th, 1913, and many proceedings have been had and taken therein by both

parties and much testimony by way of deposition has been taken by both the plaintiff and the defendant, and the same is now ready for trial and can be speedily heard and determined, the same having been set for trial on August 25, 1914, whereas it is wholly problematical as to when the case in New Jersey can be reached for trial and disposed of on final hearing. [54] And in this behalf defendant denies that the said New Jersey case is now ready for hearing, but on the contrary avers that depositions to be used therein have not been taken, and that the depositions already taken in the case at bar have not been stipulated in that case nor has any request for such stipulation been made by defendant's attorney.

4. And answering paragraph VII of said petition wherein it is alleged that defendant herein is one of the many hundreds of dealers of Thomas A. Edison, Inc., located and doing business throughout the United States, plaintiff reiterates what it has already said in that regard, viz.: that the defendant is the general Pacific Coast distributing agent of Thomas A. Edison, Inc., engaged in selling the horns in question to the numerous dealers throughout the Pacific Coast.

5. And answering paragraph VIII of the petition where it is alleged that the defendant is not engaged at this time and has not been for a long time engaged in selling the infringing horns, plaintiff avers that it has no knowledge sufficient to inform it whether or not the defendant is now engaged or has been engaged since the decision of the Court of

Appeals in selling said horns, but in that behalf avers that prior to the decision of the Court of Appeals defendant was engaged in selling and advertising for sale such horns, and upon its appeal to the Court of Appeals from the order granting an injunction caused said injunction to be stayed pending the appeal by furnishing a bond. If, therefore, defendant has ceased to sell these horns it must have been only since the decision of the Court of Appeals.

6. And answering paragraph IX of said petition relating to the suit of this plaintiff against Babson Bros., Inc. No. 7, pending in this court, plaintiff avers that that suit was begun on or [55] about March 12, 1913, before the commencement of the suit against defendant herein, and was begun on the theory that Babson Bros., Inc., was the Pacific Coast distributors of Thomas A. Edison, Inc., plaintiff having been informed to that effect, and not knowing anything about the existence of the defendant company herein known as the Pacific Phonograph Company; that after said suit against Babson Bros., Inc., had been pending a short while, plaintiff ascertained for the first time that Babson Bros., Inc., was not the distributing agent of the Edison Company's goods but was merely a dealer therein, and that the Pacific Phonograph Company, defendant herein, was the Pacific Coast distributing agent; that thereupon plaintiff commenced the present suit against Pacific Phonograph Company but took pains to notify Thomas A. Edison, Inc., that the Babson suit had been brought through a misapprehension and that it was not the intention of plaintiff to harass

Thomas A. Edison, Inc., to defend two suits and that the Babson case would not be prosecuted independently but would be allowed to abide by the decision in the suit against Pacific Phonograph Company, and thereupon plaintiff made an arrangement with Babson Bros., Inc., whereby it authorized and permitted said Babson Bros., Inc., to continue the sale of the infringing horns, and has recently entered into a stipulation providing that the decision in the Babson case shall abide by the decision in the case at bar, and the fact is that the Babson case has been stricken from the calendar and is not to be prosecuted independently, and that the business of Babson Bros., Inc., has not been interrupted and that that company is now selling the said horns without molestation, all of which facts are well known to Thomas A. Edison, Inc.

7. And answering paragraph X of said petition, plaintiff denies that it has threatened and still threatens and continues to [56] threaten to bring many other similar suits against dealers of Thomas A. Edison, Inc., or that unless restrained by this Honorable Court will bring such suits, or will prosecute the same, or will continue to prosecute any such suit or suits.

8. Answering paragraph XII of said petition, wherein it is alleged that the defendant is not a manufacturer of the infringing horns but is merely one of the many dealers of Thomas A. Edison, Inc., and procured the horns complained of from said company, plaintiff admits that defendant is not a manufacturer of said horns, and that it procured the

same from Thomas A. Edison, Inc., but in that behalf avers that neither did Thomas A. Edison, Inc., manufacture the said horns or any of them, but procured and purchased the same from sundry other companies located in the Eastern States who manufactured the same and sold them to Thomas A. Edison, Inc., the sequence of facts being that the manufacturing company in the East manufactured the horns and sold them to Thomas A. Edison, Inc., that Thomas A. Edison, Inc., delivered them to the defendant herein as its Pacific Coast distributing agent, and that the defendant herein in turn sold them to the various dealers throughout the Pacific Coast, and that these dealers then sold them to the users or ultimate consumer.

9. And answering paragraphs XIII and XIV of said petition wherein it is alleged that the plaintiff is not at this time engaged in manufacturing and selling such horns and has not been so engaged since May, 1908, and that when so engaged prior to May, 1908, made and sold the horns to dealers throughout the United States and derived their profits from the unconditional sale thereof direct to such dealers, this plaintiff avers the facts of this matter to be as follows: That it acquired title to the patent in suit on January 4, 1907; that at said time it was engaged [57] in endeavoring to manufacture and sell two other styles of horn known as the Searchlight Folding horn and the Parabolic horn; that on purchasing the patent on January 4, 1907, plaintiff continued its efforts to market said parabolic and Searchlight folding horns, and at the same time

made an effort to manufacture and sell horns covered by the Nielsen patent, known as the "Flower Horn," and made a small number of said horns more as samples than anything else, but was unable to market the same or to make any profit therefrom by reason of the fact that the said Nielsen patent was being largely and extensively infringed by the phonograph companies, especially by Thomas A. Edison, Inc., and plaintiff was unable to compete with them, and such competition became so great that the plaintiff's business was destroyed and became practically bankrupt. On or about May 1st, 1908, plaintiff was compelled to and did transfer and dispose of its said business to other parties and then and there ceased to make or sell any kind of horn whatever and has never since then been able to resume its horn business and lost therein somewhere in the neighborhood of forty thousand dollars (\$40,000.00); that the plaintiff has not been able to resume its business since May, 1914, and is embarrassed to such an extent in its finances that it is impossible to resume the same, for which reason it went out of the business of making and selling horns in May, 1908, having been compelled thereto by the infringing acts of Thomas A. Edison, Inc., and the other talking machine companies in the United States and manufacturers of infringing horns; but the plaintiff never has received or enjoyed any profits from the manufacture and sale of the patented horns and in fact has only manufactured a small number thereof more as samples than as anything else, with a view to ascertaining if it will be possible to make any profit

from making and selling such horns, and under [58] these circumstances the compensation which the plaintiff is entitled to receive from Thomas A. Edison, Inc., in respect of its infringing acts is not measured by any profits which the plaintiff would have realized from the manufacture and sale of its horns, but is measured by such actual damage as may have been sustained by plaintiff and by such actual profits as Thomas A. Edison, Inc., may have realized from its infringement.

And answering the latter portion of paragraph XIV of said petition, that upon the satisfaction of Thomas A. Edison, Inc., of any judgment which may be rendered upon an accounting in the New Jersey suit, the infringing horns sold by Thomas A. Edison, Inc., to its numerous dealers throughout the United States would be released from the patent monopoly and the defendant herein would not be liable to the plaintiff, this plaintiff denies the said allegations and avers that such is not its understanding of the law, and further denies that under the circumstances stated in said petition plaintiff will still be entitled to have a final injunction against the defendant herein preventing future infringement even though the past infringements should be settled for.

10. And answering paragraphs XV and XVI of said petition, plaintiff denies that if it be not restrained from continuing the prosecution of the present suit and bringing others of a like nature, irreparable or any injury or damage would result by the loss to the Thomas A. Edison, Inc., of its dealers or any of its dealers who on account of the harass-

ments or annoyances or expense occasioned by the acts of the plaintiff, or any other cause, will fall away from Thomas A. Edison, Inc., or will cease to patronize that company in the purchase of any or all machinery or accessories of every or any kind or nature incident to the talking machine [59] business or outside of or wholly foreign to the phonographic horns in question, denies that the purpose of the plaintiff in the acts and course which it is alleged to be pursuing and threatens to pursue is to harass or annoy any dealer or dealers of Thomas A. Edison, Inc., or to harass or annoy Thomas A. Edison, Inc., or to put that company or your petitioner or any dealer or dealers generally to needless or any expense by being called on to defend the multiplicity of suits, or any suit or suits for infringement; that the allegations of petitioner in that behalf is a mere pretense and a sham, and that neither the defendant, nor Thomas A. Edison, Inc., has any fears whatever that it will lose any of its dealers on account of any suit or suits brought or to be brought by plaintiff, the fact being that said Thomas A. Edison, Inc., guarantees to protect all of its dealers against suits for infringements of patents.

11. And for a further and separate answer to said petition, plaintiff avers that the present suit is in the nature of a test case in regard to the Edison infringing horns and has always been so treated by the parties thereto; that the same has always been defended and is now being defended by Thomas A. Edison, Inc., under an agreement whereby said Thomas A. Edison, Inc., guarantees to protect the

defendant against infringement suits; and that after the commencement of this suit, Thomas A. Edison, Inc., took charge thereof and of the defense and employed counsel to defend the same on behalf of Thomas A. Edison, Inc., but in the name of the defendant; that when a motion for an injunction was made, Thomas A. Edison, Inc., sent its chosen attorney from New York City to oppose the motion at San Francisco, and such attorney did oppose the motion and took an appeal from the order granting the injunction, and when said appeal came up for hearing in the Court of Appeals, said attorney again came to San Francisco on [60] behalf of Thomas A. Edison, Inc., and argued said appeal in the Court of Appeals and filed a brief therein; that in addition to the foregoing, the said attorney for Thomas A. Edison, Inc., took numerous and extensive depositions in the Eastern States for use on final hearing of the case, and many of the witnesses being the employees of Thomas A. Edison, Inc.; that negotiations for settlement of the controversy have from time to time been conducted and plaintiff carried on all those negotiations directly with Thomas A. Edison, Inc., and its employees and agents, it being recognized and understood by all parties concerned that the real party in interest in this case was Thomas A. Edison, Inc., and that the Pacific Phonograph Company was a mere figure-head; that the depositions for final hearing had been taken in this case by both plaintiff and defendant in the Eastern States, and the said case is ready for final hearing; said case was called here on a previous calendar of

this court and the same was continued for the term at the request of defendant's attorney, because of the fact that an appeal from the motion granting an injunction was then pending and had not been decided; that such appeal was decided on May 4th, 1914; that thereupon defendant's attorney stipulated in writing with plaintiff's attorney that this case be restored to the calendar for final hearing and it was placed on the July, 1914, calendar and was regularly called on August 10th, 1914; that upon the calling it was set down for final hearing on August 25, 1914, without any protest or objection from defendant's attorney; that it was not until the service of the petition herein that plaintiff was formally notified that any objection would be made to the trial of this case on August 25th. Plaintiff further avers that if this case is heard and disposed of on August 25, 1914, inasmuch as the same is a test [61] case and is being defended by Thomas A. Edison, Inc., such judgment as may be rendered therein would become, as plaintiff is informed and believes, *res adjudicata* as to Thomas A. Edison, Inc., and will operate as such in the suit against Thomas A. Edison, Inc., in New Jersey, whereby a speedy determination of the litigation may be had, whereas if the prosecution of this case is suspended, and plaintiff is required to try the New Jersey case first, the litigation will be extended indefinitely and there is no telling when the same can be concluded; that the New Jersey case is not ready for hearing, because of the fact that the depositions have not yet been taken therein, nor have the depositions which

were taken in the case at bar been stipulated in that case, nor has any request for such stipulation been made; and furthermore the condition of the calendar in the New Jersey court is of so crowded a nature that there is no telling when the case can be reached, and in fact no calendar will be called for a considerable period of time because of the pending vacation; that there are a great many cases at issue on said New Jersey calendar which are ahead of the plaintiff's case against Thomas A. Edison, Inc., and it is utterly impossible to tell when the case will even be reached for trial, much less when it can be tried, and even after a trial an appeal would be taken and a further delay thereby would follow.

12. And as a further ground for denying this petition, plaintiff avers that it is now in financial difficulties and has no money for its own use with which to prosecute this litigation but is compelled to borrow the same at a great sacrifice; that the trial of the case at bar can be had with comparatively small additional expense, whereas to compel plaintiff to try the New Jersey case first would entail a very great and onerous and burdensome expense upon the plaintiff, which at the present time it sees [62] no way of meeting: that Thomas A. Edison, Inc., is a very rich and powerful corporation having millions of dollars of assets, and the matter of expense to it is of small moment whereas the matter of expense to the plaintiff is vital.

WHEREFORE plaintiff prays that said petition be denied and that the trial in the case be allowed

to proceed at the time for which it was set.

JOHN H. MILLER,
Attorney for Plaintiff. [63]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

J. H. MILLER, being duly sworn, deposes and says that he is attorney for plaintiff in the within entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true *of own* knowledge, except as to the matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

That this affidavit is made as of August 24, 1914.

JOHN H. MILLER.

Subscribed and sworn to before me this 17th day of September, 1914.

[Seal] GENEVIEVE S. DONELIN,
Notary Public in and for the City and County of
San Francisco, State of California.

By consent of defendant's attorney and by direction of the Judge.

[Endorsed]: Filed Sept. 17, 1914, *nunc pro tunc* August 24, 1914. Walter B. Maling, Clerk. [64]

*In the District Court of the United States, Northern
District of California, Second Division.*

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Petition for Order Allowing Appeal.

Pacific Phonograph Company, the above-named defendant, conceiving itself aggrieved by the Order made and entered by said Court in the above-entitled cause on the 24th day of August, 1914, denying defendant's motion that complainant be enjoined and restrained from the further prosecution of the above entitled suit and from bringing any other suit or suits within the jurisdiction of this court against vendees of Phonographic Horns, alleged to be an infringement of United States Letters Patent No. 771,441, and secured from the vendor thereof—the Thomas A. Edison, Incorporated, party defendant to Equity Suit No. 575, pending in the United States District Court for the District of New Jersey, entitled Searchlight Horn Company vs. Thomas A. Edison, Incorporated, comes now by N. A. Acker, Esq., its solicitor and counsel, and petitions said Court for an order allowing defendant to prosecute an appeal from said order denying said injunction and restraining order unto defendant as aforesaid, to the Honorable, the United States Circuit Court of Appeals for

the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the [65] sum of security which defendant shall give and furnish upon such an appeal, and that upon the giving of said security, further proceedings in this court shall be stayed pending the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

D. HADSELL,

N. A. ACKER,

Solicitors and of Counsel for Deft.

[Endorsed]: Filed Sept. 17, 1914. Walter B. Mal-
ing, Clerk. [66]

*In the District Court of the United States, Northern
District of California, Second Division.*

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Assignment of Errors.

Comes now the defendant above named and specifies and assigns the following as errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the decree or order of August 24th, 1914, refusing

to enjoin and restrain complainant in the above-entitled suit.

First. That the District Court of the United States, Northern District of California, Second Division, erred in refusing defendant's said motion.

Second. That said Court erred in denying unto the defendant an order adjudging or decreeing that complainant be enjoined or restrained from any further prosecution of the suit against the said defendant in this Circuit, until the determination of the suit now pending in the District Court of the United States for the District of New Jersey, between the complainant herein and the Thomas A. Edison, Incorporated, vendor of the above named defendant.

Third. That said Court erred in not ordering, adjudging or decreeing that complainant be enjoined or restrained from bringing within its jurisdiction any other suit or suits against [67] vendees of the said vendor, Thomas A. Edison, Incorporated, until the determination of Equity Suit No. 575, now pending in the United States District Court for the District of New Jersey, between the Complainant herein and the said Thomas A. Edison, Incorporated.

Fourth. That said Court erred in holding that any judgment which could be rendered in said Equity Suit No. 575, now pending in the District Court of the United States for the District of New Jersey, between the Complainant herein and the Thomas A. Edison, Incorporated, would not operate as a license to all or any of the vendees of the said Thomas A. Edison, Incorporated, to sell and dispose of the alleged infringing Phonographic Horns in the Posses-

sion of the said vendees.

Fifth. That said Court erred in not holding that where a patentee, situated as complainant herein, recovers from an infringing vendor damages and profits on account of the infringement and the judgment is paid, the vendee or vendees of such vendor has the same right to such patented article as he would have were he a licensee from the patentee.

Sixth. That said Court erred in not holding that the continued prosecution of the present suit and the right to bring and prosecute within its jurisdiction other suits against vendees of the Thomas A. Edison, Incorporated, is and would be oppressive.

Seventh. That said Court erred in refusing unto the defendant herein, the relief prayed for by its said motion, and as set forth in the petition accompanying the same.

In order that the foregoing assignment of errors may be and appear of record, the defendant presents the same to the Court and prays that such disposition may be made thereof as in accordance with the law of the United States. [68]

Wherefore, the said defendant prays that the said order of this court made and entered on the 24th day of August, 1914, denying its motion to enjoin and restrain the complainant herein, be reversed and that the United States District Court, Northern District of California, Second Division, be directed to enter an order setting aside the said order or decree of August 24th, 1914.

All of which we respectfully submit,

D. HADSELL,

N. A. ACKER,

Solicitors and Counsel for Deft.

[Endorsed]: Filed Sept. 17, 1914, Walter B. Maling, Clerk. [69]

*In the District Court of the United States, Northern
District of California, Second Division.*

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Order Allowing Appeal, etc.

In the above-entitled cause, the defendant, Pacific Phonograph Company, having filed its Petition for an Order allowing an Appeal from the Order of this court made and entered August 24th, 1914, together with its assignment of errors:

Now, upon motion of N. A. Acker, Esq., solicitor for defendant, it is ordered that said appeal be, and hereby is, allowed to defendant, Pacific Phonograph Company, to the United States Circuit Court of Appeals for the Ninth Circuit, from said decree or order made and entered by this Court in this cause on August 24th, 1914, denying that complainant be enjoined and restrained from any further prosecution of the foregoing suit and from bringing any other suit or suits within the jurisdiction of this

Court against vendees of the vendor of the Phonographic Horns alleged to be an infringement of United States Letters Patent, No. 771,441, and that the amount of defendant's bond upon said appeal be and the same is fixed at \$500.00, and it is further ordered that upon the filing of such security a certified transcript of the records and proceedings herein be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, in [70] accordance with the Rules in Equity of the Supreme Court of the United States and the statutes made and provided.

WM. C. VAN FLEET,
District Judge.

September 16th, 1914.

[Endorsed]: Filed Sep. 17, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [71]

*In the District Court of the United States, Northern
District of California, Second Division.*

IN EQUITY—No. 18.

SEARCHLIGHT HORN COMPANY,
Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,
Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That Fidelity & Deposit Company of Maryland, a
corporation duly organized and existing under and

by virtue of the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Searchlight Horn Company, a corporation, (Complainant in the above-entitled suit), in the sum of Five Hundred Dollars (\$500.00), to be paid unto the Searchlight Horn Company, its successors and assigns, for which payment, well and truly to be made, the Fidelity & Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents, sealed with its corporate seal and dated this 23d day of September, 1914.

The condition of the above obligation is such that whereas the said Pacific Phonograph Company, (Defendant in the above-entitled suit), has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse an order or decree made, rendered and entered on the 24th day of August, 1914, by the District Court of the United States, Northern District of California, Second Division, in the above-entitled cause denying unto the said defendant an order adjudging or decreeing that the above-named complainant be enjoined or restrained from the further [72] prosecution of the above-entitled suit in the District Court of the United States, Northern District of California, Second Division, and from bringing within its jurisdiction any other suit or suits against vendees of the Thomas A. Edison, Incorporated, pending the determination of Equity Suit No. 575, now pending in the United States District Court for the District of New Jersey, between the complainant to the above-entitled suit

and Thomas A. Edison, Incorporated, vendor of the Pacific Phonograph Company, defendant in the above-entitled suit, for infringement of United States Letters Patent No. 771,441, granted Peter Nielsen, October 4th, 1904, for improved Phonographic Horn.

NOW, THEREFORE, the condition of the above obligation is such that if the said Pacific Phonograph Company shall prosecute its said Appeal to effect and answer all costs which may be adjudged if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

By PAUL M. NIPPERT,
Attorney in Fact.

[Seal] Attest: GUY LE ROY STEVICK,
Agent.

Approved Sept. 23d, 1914.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Sep. 24, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [73]

UNITED STATES OF AMERICA.

*District Court of the United States, Northern
District of California.*

CLERK'S OFFICE.

No. 18—EQUITY.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

Praecipe [for Record on Appeal].

To the Clerk of said Court:

Sir: Please prepare Transcript on Appeal to the
United States Circuit Court of Appeals for the Ninth
Circuit, consisting of the following papers:

Bill of Complaint;

Answer;

Amendments to Answer;

Defendant's Petition to enjoin prosecution of suits;

Notice of Motion and Affidavits attached thereto;

Minute Order denying petition to enjoin prosecution
of suits;Plaintiff's Answer to Defendant's Petition to enjoin
prosecution of suits;

Petition for Order Allowing Appeal;

Assignment of Errors;

Order Allowing Appeal; and
Bond on Appeal.

DAN HADSELL,
N. A. ACKER,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 9, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [74]

UNITED STATES OF AMERICA.

*District Court of the United States, Northern
District of California.*

CLERK'S OFFICE.

No. 18.

SEARCHLIGHT HORN CO.

vs.

PACIFIC PHONO. CO.

[Supplemental] Praecipe [as to Record on Appeal].

To the Clerk of said Court:

Sir: Please *issue* add in making up record on appeal from order denying motion to suspend, the Stipulation of parties filed Aug. 24, 1914.

JOHN H. MILLER,
Attorney for Plff.

[Endorsed]: Filed Oct. 30, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [75]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 18.

SEARCHLIGHT HORN COMPANY,

Plaintiff,

vs.

PACIFIC PHONOGRAPH COMPANY,

Defendant.

**Certificate of Clerk U. S. District Court to Record on
Appeal.**

I, WALTER B. MALING, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing seventy-five (75) pages, numbered from 1 to 75 inclusive, to be full, true and correct copies of the records and proceedings as enumerated in the praecipes for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$41.40; that said amount was paid by N. A. Acker, Attorney for defendant; and that the original Citation issued in said cause is hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 14th day of November, A. D. 1914.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [76]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Searchlight Horn Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein Pacific Phonograph Company is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 24th day of September, A. D. 1914.

WM. C. VAN FLEET,

United States District Judge. [77]

Received copy of within citation this 28th of September, 1914.

JNO. H. MILLER,
Attorney for Appellee.

[Endorsed]: No. 18. United States District Court, for the Northern District of California, Second Division. Pacific Phonograph Co., Appellant, vs. Searchlight Horn Co. Citation on Appeal. Filed Oct. 10, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2518. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Phonograph Company, a Corporation, Appellant, vs. Searchlight Horn Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Received and filed November 20, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

PACIFIC PHONOGRAPH CO.,

Appellant,

vs.

SEARCHLIGHT HORN CO.,

Appellee.

**Order Extending Time to File Record and to Docket
Cause.**

Good cause appearing therefor, IT IS ORDERED that the appellant herein have to and including November 21st, 1914, within which to file its record on appeal and to docket the suit in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated October 23, 1914.

WM. W. MORROW,

United States Circuit Judge, Ninth Judicial Circuit.

[Endorsed]: No. 2518. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Nov. 21, 1914, to File Record Thereof and to Docket Case. Filed Oct. 23, 1914. F. D. Monckton, Clerk. Refiled Nov. 20, 1914. F. D. Monckton, Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC PHONOGRAPH
COMPANY, a Corporation,
Appellant,

vs.

SEARCHLIGHT HORN
COMPANY, a Corporation,
Appellee.

APPELLANT'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
SECOND DIVISION

N. A. ACKER,
D. HADSELL,
J. EDGAR BULL,

Solicitors for Appellant.

Filed

MAR 6 - 1915

F. D. Monckton,

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACIFIC PHONOGRAPH
COMPANY, a Corporation,
Appellant,
vs.
SEARCHLIGHT HORN
COMPANY, a Corporation,
Appellee.

No. 2518

APPELLANT'S BRIEF

This is an appeal, under Sec. 129 of The Judicial Code, 36 Statutes at Large 1087, U. S. Compiled Statutes of 1901 Supplement 1911, page 194, from an order of the United States District Court for the Northern District of California, Second Division, denying an Interlocutory Injunction.

HISTORY OF THE CASE.

Appellee herein—Searchlight Horn Company—on the 9th day of May, 1913, commenced a suit in Equity, No. 18, as plaintiff, in the United States Dis-

trict Court for the Northern District of California, against Appellant herein, Pacific Phonograph Company, as defendant, for infringement of a patent for Horns for Phonographs and Similar Machines.

In this suit a preliminary injunction was asked for and was granted on June 24, 1913, and thereafter said appellant took an appeal to this Court from the order granting the preliminary injunction in the Equity suit, No. 18, which order was by this Court, on May 4, 1914, affirmed.

Immediately thereafter appellee herein commenced a suit in Equity, No. 575, in the District Court of the United States for the District of New Jersey, against Thomas A. Edison, Inc., for infringement of the same patent, which said suit reached issue on or about June 27, 1914.

On August 17, 1914, appellant herein filed its Petition in the Court below (Record page 31) praying for an order enjoining the appellee herein from further prosecuting said suit No. 18 and from bringing any more suits of a like nature against dealers in Phonographic Horns supplied by Thomas A. Edison, Inc., until rendition of judgment of the District Court of the United States for the District of New Jersey upon the Master's report on an accounting in the said Equity suit, No. 575, then pending in New Jersey against Thomas A. Edison, Inc.

Upon hearing this Petition the Court below on August 24, 1914, denied the application for such interlocutory injunction (Record page 55) and it is from this order denying said injunction that the present appeal is taken.

STATEMENT OF THE CASE.

Appellee herein, Searchlight Horn Company, the owner of the patent sued on, was, prior to May, 1908, engaged in the manufacture of the patented horns, and it sold said horns to dealers throughout the United States. It was not itself a user of said horns but derived its profit, or attempted to do so, by the manufacture and unconditional sale of said horns direct to dealers throughout the United States. Since the date above mentioned, it has not been engaged in such manufacture and sale. (See appellant's Petition, paragraphs XIII and XIV, Record page 36, and appellee's admission of same in Answer to Petition, paragraph 9, page 62.)

Appellant herein, Pacific Phonograph Company, is a dealer in music and musical instruments, and is one of many customers of Thomas A. Edison, Inc., and all the phonographic horns complained of as infringements in the present suit were purchased by said Pacific Phonograph Company from said Thomas A. Edison, Inc. (Record pages 34-35, paragraphs VII and XII, Appellant's Petition.)

This is not denied by appellee, its answer to paragraph VII (Record page 59, section 4) contenting itself with calling appellant the general Pacific Coast distributing agent of Thomas A. Edison, Inc., but later in its Answer to paragraph XII (Sec. 8, Record pages 61-62) appellee admits the same.

Thomas A. Edison, Inc., the defendant in the New Jersey suit, No. 575, sells the phonographic horns to its customers, amongst whom is the appellant herein, and the horns complained of as infringements in the

New Jersey suit are the horns sold by Thomas A. Edison, Inc., to its various customers, and amongst the horns so complained of are those sold to the appellant herein; and those sold to Babson Brothers, Inc., another purchaser from Thomas A. Edison, Inc., the defendant in another suit in Equity, No. 7, brought by appellee herein in the United States District Court for the Northern District of California, Second Division (Record page 34, paragraph IX.)

It should now be clear that Thomas A. Edison, Inc., is the source from which spring the infringements involved in the whole matter, and that, assuming infringement, this Company in selling the horns to its various customers, throughout the United States, has usurped the place of the appellee herein, Searchlight Horn Company, which, if not thus driven out, would presumably be selling the patented horns to these same purchasers. This idea is clearly conveyed in another form of expression found in the Petition herein; namely, that all the horns which have been and may be complained of as infringements in suits already brought or to be brought against customers of Thomas A. Edison, Inc., are horns which are subject to the accounting in the suit pending in New Jersey against Thomas A. Edison, Inc.

(Record page 35, paragraph XI.)

It is also clear that upon accounting for the infringing horns and satisfying any judgment which may be rendered in the New Jersey case, against Thomas A. Edison, Inc., the horns so accounted and paid for by the Company will be released from the patent monopoly and the customers of the Company

who bought said horns will not be liable to appellee herein.

(Record page 36, paragraph XIV.)

ARGUMENT.

The seven assignments of error (Record pages 72-73) are but variations of one idea and need not be separately treated. They are all included in the sole contention that a state of facts is here presented which brings the case fully within the now well established law on the subject.

This law has lately found its final expression in a well considered case recently decided by this Court, and so completely does the doctrine of that case cover the present case that our task is simplified and is reduced to the mere necessity of brief comparison.

It is our contention that the case of *Stebler v. Riverside Heights Orange Growers Association, et al.*, 214 Fed. 550, decided May 30, 1914, by this Court, completely controls the present case, and must result in reversing the Court below.

The Stebler case marks an advance in patent law so clearly logical and inevitable as to excite wonder that its generic principle was not sooner recognized and announced. This advance is true, notwithstanding that in the memorandum opinion of the Court below published in the record of the Companion Appeal, Case No. 2518, its doctrine seems to be regarded as a restricted species, thus giving opportunity for distinctions which, we respectfully submit, are without difference.

To come at the matter speedily, we contend that

the doctrine in the Stebler case, as announced by this Court, is generic, and covers any set of facts and circumstances in which there is a suit against a primary or main infringer against whom a judgment and recovery may be had which will give to the patentee all the latter could have had, or to which he would be entitled under his patent, if such infringement had not occurred; and the patentee's full measure of compensation is had and expressed when he recovers from, or is entitled to recover from the primary or main infringer, the damages he has suffered, and the gains, profits and advantages the infringer has made from his infringing acts. The foundation of this lies in the fact that when he makes such recovery, the infringing articles are released from the patent monopoly, just as fully as if he had sold them himself, and he cannot follow them beyond the primary or main infringer. This being true, and the doctrine of the Stebler case being as broad and generic as we read and state it, it makes not one bit of difference by what name we call the primary or main infringer, whether he be a manufacturer, or a seller; and it makes no difference whether the ultimate infringers be sellers or users.

If there be a fountain head from which *full compensation* can flow, and if the patentee seek his compensation from that source, he can, under the principle and doctrine of the Stebler case, be restrained from seeking such compensation at the same time from the numerous rivulets which have their source in such fountain head; at least, until such time as he shall find the head exhausted. There is no point to be made in "manufacturer" nor in "user," It so hap-

pened in the Stebler case that these were the forms or species appearing, and so also in previous cases, more or less approaching the doctrine under consideration; because those forms are the most natural, the most common. A manufacturer is generally the primary or main infringer; and a user is commonly the ultimate infringer. Because of what opposing counsel has called a “tactical” advantage, it is common to sue a user, and quite frequently, in an excess of “tactical” advantage, to sue a goodly number of users; and this is allowable. But when he forgets himself and sues the manufacturer, whether before or after he sues the users, and all the suits are pending, then Equity will interpose its injunction to the suits against the users, and require him to seek his compensation first from the manufacturer.

The reasons for this as announced by this Court in the Stebler case are such as apply with equal force, are just as cogent, just as logical, just as true, in case the *main* infringer be a wholesale seller, and the ultimate infringers be jobber sellers, or retail sellers, *provided* the circumstances of the case be such that the patentee can recover, and seeks to recover from the main infringer his *full compensation*.

If we can show this, it is clear that the Court below is in error, for by reference to the Memorandum Opinion (published in the Record of the Companion Appeal 2519, pages 130-133) it will be seen that though His Honor, Judge Van Fleet, was, at first, upon the argument of the Petition, impressed with the applicability of the principles in the Stebler case (he cited only the Stebler case in the Court below, 211 Fed. 985, though the appeal therefrom had at that

time been decided but not published) he afterwards concluded that his first impression was erroneous, and thereupon denied the Petition upon the distinction that the Stebler case presented a manufacturer and numerous users, while the present case presents a main seller, and numerous resellers who purchase from the main seller.

Let us now see whether this is, in reality, a difference which means a departure from the doctrine or principle announced by this Court in the Stebler case.

The Court says:

“The plaintiff is a manufacturer and seller of the machines covered by his patent”—

This was true of the present appellee, the Searchlight Horn Company.

And the Court further says:

“—and the sole profits which he derives from his patent are those arising from the manufacture and sale of the machines covered thereby.”

True also of Searchlight Horn Company.

Further the Court says:

“The suits brought by the plaintiff, and sought to be enjoined by the petition of the defendants, are against users of machines which had been manufactured and sold by the defendants prior to the rendition of the opinion of this Court and the entry of the interlocutory decree in the lower Court pursuant thereto.”

In the present case the suits sought to be enjoined are against resellers of the horns purchased from a main seller.

The Court goes on to say:

“The theory of the defendants’ petition is that, under the accounting ordered in the interlocutory decree entered in the Court below, the plaintiff would receive full compensation for all infringing machines which had been manufactured and sold by the defendants in violation of the plaintiff’s patent; that such machines would be thereafter released from any claim on the part of the plaintiff by virtue of his patent; and that the plaintiff, pending the entry of the final judgment against the defendants in this suit, is not entitled to bring or maintain any suits against the persons or corporations, customers of the defendants, to whom the infringing machines had been sold by the defendants, and who were users of them at the time of the institution of the various suits sought to be enjoined.”

The theory of the defendant’s petition in the present case is that under the accounting prayed for and possible, in the pending suit against Thomas A. Edison, Inc., in New Jersey, the Searchlight Horn Company, appellee herein will receive full compensation for all infringing horns sold by Thomas A. Edison, Inc., in violation of appellee’s patent; that such horns would be thereafter released from any claim of appellee; and that appellee, pending the entry of final judgment against Thomas A. Edison, Inc., in the pending New Jersey case is not entitled to bring or maintain any suits against customers of Thomas A. Edison, Inc. (in the present case, Pacific Phonograph Company) to whom the infringing horns had been sold by Thomas A. Edison, Inc., and who were sellers of them at the time the various suits were brought.

These theories are manifestly alike. Verbally they

differ in the use of manufacturer and user on the one hand, and seller and purchaser on the other hand. But the *essential* fact of each statement of the theory is identical, namely, that if *full compensation* may be had from a central or main infringer, the infringing devices are released from the monopoly of the patent, and cannot be followed beyond the main infringer. What possible distinction in this principle can be founded upon whether the main infringer be a manufacturer or a seller, or whether the succeeding infringer be a user or a reseller? None, we say, for these are but words; the real thing is the *full compensation*, resulting in release from the patent monopoly.

Continuing, the Court in the Stebler case says:

“The defendants were manufacturers of and general dealers in machinery of various kinds used in the business of fruit packing, and it is not to be denied that the institution and prosecution of the suits set forth in the petition, and similar suits, against customers of the defendants, would have the effect of harassing and annoying the defendants’ customers; that they would be put to heavy expense; and that the probable outcome would be the loss to the defendants of the patronage of such customers and the consequent depreciation and destruction of their business as dealers in packing house machinery and supplies.”

Is this not true of the present case? Is it not true that frequently in patent cases, it is thought a terrifying pressure on users and customers is a wholesome thing, one well adapted to bring the main infringer to time, a “tactical” advantage as counsel says. The number of these tactical suits is merely a matter of

degree. In the Stebler case the maximum was, perhaps, reached. In the present case we find two such suits against customers, but the potentiality of others is not eliminated.

Judge Morrow continues:

“The bill of complaint filed by the plaintiff in this case asked that the defendants be decreed to account for and pay over unto the plaintiff the gains and profits realized by the defendants from and by reason of the infringement, and further, that the defendants be decreed to account for and pay over unto the plaintiff the damages suffered by him by reason of the infringement.”

In the case now pending against the main infringer, Thomas A. Edison, Inc., in New Jersey, the prayer is the same, that is, for profits and damages. (Record page 45, Affidavit of Pommer.)

This Court in the Stebler case continues:

“There was thus distinctly provided a method whereby the plaintiff might recover all losses suffered by him by reason of the infringement of his patent—those in the nature of damages as well as those in the nature of profits received by the infringing defendants.”

Precisely the same method is provided in the pending case against Thomas A. Edison, Inc.

To quote further:

“There is no controversy in the case as to the financial ability of the defendants to respond to whatever judgment might be finally rendered against them upon the final hearing of the case.”

There is no controversy here as to the financial ability of Thomas A. Edison, Inc., to respond to judgment.

The Court continues:

“To permit the plaintiff, under such circumstances, to institute and maintain suits against the customers of the defendants, to whom the infringing machines have passed, would, it is obvious, be harassing, annoying, and expensive, and would place the plaintiff in a position to maintain the suits to recover full compensation in a double proportion for the losses suffered by him by reason of the infringement.”

This is true of the present case.

Judge Morrow continues:

“The plaintiff derives his profits from the the manufacture and sale of the fruit grading machines covered by the patent. These profits consist of the difference between the cost of manufacture and the prices for which he sells the machines. These profits are therefore the only compensation which he receives for the machines manufactured and sold by him during the entire life thereof. When final judgment is entered against the defendants pursuant to the accounting which has been ordered against them, the plaintiff will receive thereunder full compensation for the use of the machines by the vendees of the defendants herein for such period as they are capable of being used, in the same manner and to the same extent as he would have done had he sold the machines himself. This being true, a decree against the defendants for the profits which they received by reason of the sales of the infringing machines, together with whatever damages the plaintiff may have suffered by reason thereof, must be held to vest the right to

the use of the machines in the defendants' vendees free from any further claim by the patentee."

Here we find finally and fully stated the idea of *full compensation* resulting in a release of the infringing devices from the monopoly.

It cannot be said that a material difference exists between a *manufacturer* infringer paying the full compensation and a seller infringer doing so, nor between the release of the infringing devices in the hands of one form of customer, namely, a user, and another form of customer, to-wit, a reseller. The essential things are *full compensation* and *release*, and it is immaterial from what source the former comes, or in whose hands the latter is effective. If these are the essential things, it is clear that the statement of the Court below that all the defendants to these suits are guilty of precisely like acts of violation of plaintiff's rights, differing only in degree but not in kind, is wholly beside the mark. It may be true, and they may be, as the learned Judge says, both tort-feasors and equally liable to a suit by plaintiff at his pleasure or election, and yet when plaintiff has *elected to sue both* and can get from the main tort-feasor *full compensation*, he is not permitted to continue his suits against the purchasers of the main tort-feasor, nor to bring other suits against other purchasers of the main tort-feasor, whether said purchasers be users or resellers, for in either case the infringing devices purchased by them and settled for by the main tort-feasor will be released from the patent monopoly. Nor does it matter, as the Court below seems to imply, that in the present case the

suits against the purchaser were brought before the suit against the main infringer. This was the case in *Kelley v. Ypsilanti Mfg. Co.*, 44 Fed. 19, cited by this Court in the Stebler case.

We, therefore, submit that the present appeal is well taken, in that, under the law as announced by this Court in the Stebler case, the Court below should have granted our Petition for an Injunction.

Respectfully submitted,

N. A. ACKER,

D. HADSELL,

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Solicitors for Appellant.

23

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

February Term 1915

PACIFIC PHONOGRAPH COMPANY,	}
vs.	
SEARCHLIGHT HORN COMPANY,	
Appellant, Appellee.	

BRIEF FOR APPELLEE.

JOHN H. MILLER,
Attorney for Appellee.

Filed this.....day of March, 1915.

Filed

FRANK D. MONCKTON, Clerk.

MAR 13 1915

By.....Deputy Clerk.

F. D. Monckton,
Clerk

No. 2518

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

February Term 1915

PACIFIC PHONOGRAPH COMPANY,	}
<i>Appellant,</i>	

VS.

SEARCHLIGHT HORN COMPANY,	}
<i>Appellee.</i>	

BRIEF FOR APPELLEE.

This case involves substantially the same points as the companion case of *Sherman Clay & Company v. Searchlight Horn Company*, No. 2519, in this court. The difference between the two cases is substantially a matter of names. The appellant is the Pacific Phonograph Company, who is the Pacific Coast distributing agent of Thomas A. Edison, Inc., located in New Jersey. Neither of said companies is a manufacturer of the infringing horns. The Edison Company purchased the infring-

ing horns from sundry unknown and unnamed manufacturing companies in the Eastern States and delivered them to the Pacific Phonograph Company, their Pacific Coast agent. This Pacific Phonograph Company in turn sold the horns to retail dealers throughout the Pacific Coast, and these retail dealers in turn sold them to the ultimate users. These facts place the Pacific Phonograph Company in the same category as Sherman Clay & Co., and Thomas A. Edison in the same category as the Victor Talking Machine Co. in case No. 2519.

A preliminary injunction was granted by the lower court and affirmed on appeal to this court (214 Fed. Rep. 257). All the matters stated in our brief in the Sherman Clay & Co. case with respect to the setting of the case for trial and its continuance are true of the Pacific Phonograph case. The same stipulation entered into in the Sherman Clay & Co. case was entered into in the Pacific Phonograph case, and appears at pages 53-4 of the record herein, the same having been signed by Miller & White, as attorneys for plaintiff, and J. E. Bull, Dan Hadsell and N. A. Acker, as attorneys for defendant. In fine, the Sherman Clay & Co. case and the Pacific Phonograph Co. case are proceeding *pari passu* as one and the same controversy.

We have already filed a brief in the Sherman Clay & Co. case, No. 2519, and desire that the same

be taken and considered by the court as our brief on the merits in this Pacific Phonograph case, No. 2518.

Dated, San Francisco,
March 12, 1915.

Respectfully submitted,

JOHN H. MILLER,

Attorney for Appellee.

